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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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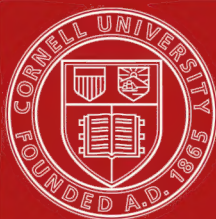
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A treatise on the law of contracts, and u



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A TREATISE
ON THE
LAW OF CONTRACTS,
AND UPON
THE DEFENCES TO ACTIONS THEREON ;

BY
JOSEPH CHITTY, JR., ESQ.

The Ninth English Edition :

BY
JOHN ARCHIBALD RUSSELL, ESQUIRE, LL. B.,
ONE OF HER MAJESTY'S COUNSEL, AND A JUDGE OF COUNTY COURTS.

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BY
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A TREATISE

ON

CONTRACTS.

SECTION III.

The Contract to Marry.

1. A contract to marry must, in general, be reciprocal, and obligatory upon both the parties; (*y*) and, therefore, an action on such a contract may be maintained by a man ^{It must be reciprocal.} against a woman; for, if the promise of the latter were void, the engagement of the man would be *nudum pactum*. (*z*) But where the contract declared on was, that in consideration that the plaintiff, at the request of the defendant, would go to L. *for the purpose of marrying the defendant*, the defendant promised to marry the plaintiff; this was held to be a sufficient consideration to support his promise. (*a*)

(*y*) See 1 Roll. Abr. 22, l. 5; Hebden v. Rutter, 1 Sid. 180; Rutter v. Hebden, 1 Lev. 147; Harrison v. Cage, Carth. 467. ["A mutual engagement must be proved, to support this action," for a breach of promise of marriage. Per Parker C. J. Wightman v. Coates, 15 Mass. 5.]

(*z*) Harrison v. Cage, 1 Ld. Raym. 386; S. C. 1 Salk. 24. [See Smith v. Sherman, 4 Cush. 408.] A promise to pay money, in consideration of discharging the defendant from his promise to marry the plaintiff, is binding; and it is sufficient to aver generally, that the plaintiff did discharge the defendant, without showing how; Baker v. Smith, cited in Aglionby

v. Towerson, Sir T. Raym. 400. A bill in equity lies to compel a discovery, whether a party has promised marriage; Vaughan v. Aldridge, For. 42; but not to enforce such a promise specifically. Cheney v. Arnold, 15 N. Y. 345.

(*a*) Harvey v. Johnston, 6 C. B. 295; S. C. 12 Jur. 981. ["As the law now stands," said Parsons C. J. in Paul v. Frazier, 3 Mass. 71, 73, "damages are recoverable for a breach of promise of marriage." "It is the common law of our country, always recognized when occasions have offered; and the occasions have not been unfrequent since the adoption of our constitution." "Several actions of this

In the case of an infant, however, whose promise is voidable, there is an exception to this rule; for, an infant may sue though he is not liable to be sued, for the breach of a promise to marry. (b)

Except in the case of an infant.

And it seems that it is not, in any case, necessary to prove an express promise to marry, *in totidem verbis*; but the contract may be evidenced by the unequivocal conduct of the parties, and by a definite understanding between them, their friends, and relations, that a marriage is to take place. (b¹) And where the promise of the man was proved in an action against him, it was held, that evidence of the woman having demeaned herself as if she concurred in, and approved of his promise, sufficiently established her promise to marry him. (c)

It need not be in express words;

nature have been before this court, since I have been upon the bench, and I remember several when I was in practice at the bar, in which I was counsel." Per Parker C. J. in *Wightman v. Coates*, 15 Mass. 4. See, also, *Boynnton v. Kellogg*, 3 Mass. 189, and Mr. Rand's notes to *Wightman v. Coates*, *supra*.]

(b) *Holt v. Ward*, 2 Str. 973; *S. C. Fitz.* 175; [*Willard v. Stone*, 7 Cowen, 22; *Cannon v. Aylsbury*, 1 Marsh. 76; *Hunt v. Peake*, 5 Cowen, 475.]

(b¹) ["A mutual engagement must be proved, to support this action; but it may be proved by those circumstances, which usually accompany such a connection;" per Parker C. J. in *Wightman v. Coates*, 15 Mass. 5; *Wells v. Padgett*, 8 Barb. (S. C.) 323; *Hubbard v. Bonesteel*, 16 Barb. 360; *Hodgskins v. Hodge*, 38 Barb. 117; *Russell v. Cowles*, 15 Gray, 582; *Culver v. Dwight*, 6 Gray, 444; *Peppinger v. Lowe*, 1 Halst. 384; *Munson v. Hastings*, 12 Vt. 346; *Whitcomb v. Wolcott*, 21 Vt. 368; *Moritz v. Melhorn*, 13 Penn. St. 331; *Wetmore v. Mell*, 1 Ohio St. 26; 11 Law Reg. N. S. 67, 68; *Button v. McCauley*, 5 Abb. Pr. N. S. 29; from a man's visits to a woman, and his declarations that he had promised to marry her; *Southard v. Rexford*, 6 Cowen, 254; *Wightman v. Coates*, 15 Mass. 1; *Greenup v. Stoker*, 3 Gil. 202; *Coil v. Wallace*, 4 Zabr. (N. J.) 291. See *Weaver v. Backert*, 2 Barr, 80;

Honeyman v. Campbell, 2 Dow. & Cl. 282; *Clark v. Pendleton*, 2 Conn. 495; *Perkins v. Hersey*, 1 R. I. 493; *Burnham v. Cornwell*, 16 B. Mon. 284; *Waters v. Bristol*, 26 Conn. 398. In *Russell v. Cowles*, 15 Gray, 582, it was held that evidence of preparation for performing the contract, made by the plaintiff in the absence of the defendant, and not in any way connected with him is inadmissible, in an action for a breach of promise of marriage, to prove the plaintiff's assent to a mutual promise of marriage. "Her deportment and behavior toward him, in connection with his behavior toward her, may furnish sufficient evidence of a mutual assent;" but "the conduct of the plaintiff in the absence of the defendant, and not in any way connected with him, has no more tendency to prove that he received her promise than it has to prove that he made one to her." *Hoar J.* 15 Gray, 586. But see *Peppinger v. Lowe*, 1 Halst. 384; *Moritz v. Melhorn*, 13 Penn. St. 331; *Wetmore v. Mell*, 1 Ohio St. 26, in which it was held that the conduct and declarations of the plaintiff, not in the presence of the defendant, were admissible as evidence of her assent to the promise made to him.]

(c) *Hutton v. Mansell*, 3 Salk. 16; *S. C. Ib.* 64; *Daniel v. Bowles*, 3 C. & P. 553. [In *Wightman v. Coates*, 15 Mass. 1, which was an action by the woman

Nor need a promise to marry be reduced into writing; (*d*) for the statute 29 Car. 2, c. 3, s. 4, applies to promises "*in consideration of marriage*," not to promises to marry. (*e*) nor in writing;

So the engagement is binding, although the precise time for completing it be not agreed upon; and, in such a case, the law presumes that the parties promised to intermarry in a reasonable or convenient time, upon request. (*f*) nor to marry within any definite time.

And where the defendant stated to the father of the plaintiff, that he had "pledged himself to marry his daughter in six months, or a month after Christmas;" Lord Ellenborough left it to the jury to say, "whether they would not presume, from the circumstances, a general promise to marry, — which the law would consider as a promise to marry within a reasonable time; and whether the declarations of the defendant had any other effect than to render that definite and certain which before was uncertain." (*g*)

But when the promise of the defendant is, to marry within a certain period, or on certain conditions, it must be declared upon accordingly. (*h*) And where the declaration charged a general promise, and the only promise proved was, Conditional promise.

against the man for a breach of promise of marriage, Mr. Chief Justice Parker said: "Is it then necessary, that an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they considered themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse, which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex or the interests of society." See the note of Mr. Rand on this point, 15 Mass. 5, note (*a*); Weaver v. Backert, 2 Barr, 80; Wells v. Padgett, 8 Barb. 323; Ellis v. Guggenheim, 20 Penn. St. 287; Fible v. Caplinger, 13 B. Mon. 464; Burnham v. Cornwell, 16 B. Mon. 284.]

(*d*) Phillpott v. Wallett, 3 Lev. 65;

Harrison v. Cage, 1 Ld. Raym. 386; Salk. 24; Bull. N. P. 280; 10 Ves. 439. [A contract to marry another at the end of five years, is within the statute of frauds, and is voidable, unless in writing; being an agreement not to be performed within a year. Derby v. Phelps, 2 N. H. 515. But the contrary was held in Clark v. Pendleton, 20 Conn. 495.]

(*e*) Cork v. Baker, Str. 34; Mountacue v. Maxwell, Str. 236; 10 Ves. 439.

(*f*) Harrison v. Cage, Carth. 476; S. C. 1 Ld. Raym. 386; Potter v. Deboos, 1 Stark. 82; Atchinson v. Baker, Peake, Add. C. 103. [And, in such a case, it is sufficient for the female suing for a breach, to allege her readiness to marry the defendant, that a reasonable time had elapsed, the defendant's failure to marry her, and his continued neglect and refusal to do so. Clements v. Moore, 11 Ala. 35.]

(*g*) Potter v. Deboos, 1 Stark. 82; and see Phillips v. Crutchley, 3 C. & P. 178; S. C. 1 M. & P. 239.

(*h*) See Cole v. Cottingham, 8 C. & P. 75. [See Clark v. Pendleton, 20 Conn. 495.]

that the defendant would marry the plaintiff within a convenient time after the death of his, the defendant's father; Lord Kenyon held, that there was a fatal variance between the declaration and the evidence. (*i*)

If the promise was to marry on request, a special request must be laid in the declaration, and proved at the trial; but Request, when necessary. if the defendant has incapacitated himself from performing his engagement, by marrying another person, and the declaration state that fact, such request need not be averred. (*j*)

And the promise is so far of a personal nature, that the breach of it furnishes no cause of action to the personal representative of the party to whom it was made, and as regards whom it was violated; at least, unless there be When personal representative can sue for breach of. laid in the declaration, and proved, some special damage affecting the personal estate of the deceased. (*k*)

2. The preëngagement of the defendant to another person forms no defence to this action, as he cannot thus avail himself of his own wrong. Nor is it a defence to this action, What will excuse a party from performing. that, at the time of the defendant's promise, the plaintiff was engaged to be married to another, and concealed that fact from the defendant; unless it be expressly averred, that the concealment was fraudulent. (*l*) And it has been held, that the promise of a man to marry within a reasonable time is valid, even although he was married at the time of making such promise; because his wife might have died within such reasonable time. (*m*)

But if the promise of the defendant was procured by fraud, *e. g.* by false representations or fraudulent concealment, as to Fraud. the circumstances or previous life of the plaintiff; this

(*i*) *Atchinson v. Baker*, Peake, Add. C. 103. [In *Burtis v. Thompson*, 42 N. Y. 246, Grover J. held that an action for the breach of promise will lie at once upon a positive refusal to perform a contract of marriage, although the time specified for the performance has not arrived. But see *Frost v. Knight*, L. R. 5 Exch. 322.]

(*j*) *Caines v. Smith*, 15 M. & W. 189; *Short v. Stone*, 8 Q. B. 358; *Harrison v. Cage*, 1 Ld. Raym. 386. [See *Clements v. Moore*, 11 Ala. 35; *Greenup v. Stoker*, 3 Gil. 202; *Blattmacher v. Saal*, 29 Barb.

22. It is sufficient to show a promise, and a refusal inconsistent with that promise. *Greenup v. Stoker*, 3 Gil. 202. The defendant's statement to the plaintiff's father, that he did not mean to perform his promise, has been held to be a sufficient breach. *Gough v. Farr*, 3 C. & P. 631.]

(*k*) *Chamberlain v. Williamson*, 2 M. & S. 408.

(*l*) *Beachy v. Brown*, E., B. & E. 796.

(*m*) *Wild v. Harris*, 7 C. B. 999, 1004; 18 L. J. C. P. 297. But see *Millward v. Littlewood*, 5 Exch. 775.

would be a good defence to an action for the breach thereof. (n)

So if the parties be related within the Levitical degrees, and their intermarriage be therefore prohibited, their promises are void, and the breach therein will afford no ground of action. (o)

Relationship within Levitical degrees.

In an action for breach of promise of marriage, the defence was, that the plaintiff was a woman of bad character, and evidence was given of one instance of gross misconduct; and Lord Kenyon admitted a witness, to state the character which he had heard of her in the neighborhood in which she lived; observing, that character was the only point in issue, — which was public opinion founded on the conduct of the party, — and therefore, what the public thought was evidence on such an issue. (p) So, in a subsequent case, (q) it appeared that, after the promise, the plaintiff had had a child; and Abbott C. J. directed the jury, that if they thought the defendant was not the father of the child, he was entitled to their verdict; for if any man who had made a promise of marriage, discovered that the person he had so promised to marry was with child by another man, he was justified in breaking such promise; and that if any man had been paying his addresses to one that he supposed to be a modest person, and afterwards discovered her to be loose and immodest, he was justified in breaking any promise of marriage that he might have made to her; but that, to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest

Bad character.

(n) Per Abbott C. J. *Wharton v. Lewis*, 1 C. & P. 529.

(o) *Harrison v. Cage*, 1 Ld. Raym. 386, 387.

(p) *Foulkes v. Sellway*, 3 Esp. 236; and per Lord Kenyon, *Atchinson v. Baker*, Peake Add. C. 103. [The defendant cannot show, by general reputation, that, after the plaintiff's promise, another had supplanted him in her affections. But he may show, that even after he had broken off all intimacy with her, she was guilty of indecent and lascivious familiarities with another man. *Willard v. Stone*, 7 Cowen, 22. See *M'Kee v. Nelson*, 4 Cowen, 355. Where, however, it appeared, that, after a promise of marriage, the woman was seduced and deserted by the man, and in

consequence thereof she acquired a bad character, he was not allowed to show, and avail himself of, that character, in mitigation of the damages, in an action brought by her for the injury arising from the breach of his promise and for seduction. Per Parsons C. J. in *Boynton v. Kellogg*, 3 Mass. 189, 192. See *Berry v. De Costa*, L. R. 1 C. P. 331. If, in an action for the breach of a promise to marry, brought by the woman, the defendant give notice, with his plea, that he will prove that the plaintiff has been guilty of fornication, but fail entirely to show it on the trial, the jury may consider this in aggravation of damages. *Southard v. Rexford*, 6 Cowen, 254.]

(q) *Irving v. Greenwood*, 1 C. & P. 350.

woman, and that the defendant broke his promise on that account ; and they must also be satisfied, that the defendant did not know her character at the time of the making of the promise ; for if a man knowingly promised to marry such a person, he was bound to do so. (*r*)

So if the promise was made by the defendant, in consideration that the plaintiff *would* have connection with him, it is void ; but, it seems, that if he renewed his promise after the illicit intercourse had taken place, the subsequent promise would be binding. (*s*)

In the course of a cause of this description, (*t*) the defendant gave in evidence many expressions used by the plaintiff at different times, in which, speaking of the defendant, a lady, he gave great proof of want of feeling, as well as of gross manners and sentiments. And Lord Ellenborough, in summing up, said “ that, notwithstanding what had passed, and the promise of marriage proved, if the plaintiff had conducted himself in a brutal or violent manner, and threatened to use her ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping ; and she might set up such defence, and it would be legal.”

So Gibbs C. J. held at nisi prius, (*u*) that, in an action against a woman for breach of promise of marriage, it is a sufficient excuse for such breach, that the person to whom she had given the promise turned out, upon inquiry, to be a man of bad character.

So, in *Atchinson v. Baker*, (*v*) it appeared that the plaintiff was a widower, upwards of forty years of age, and the defendant a widow, about the same age ; that, when the promise was made, the plaintiff was apparently in good health ; but that the defendant afterwards discovered that he had an abscess in his breast, and for that reason refused to marry him ; and Lord Kenyon said, “ that if the condition of the parties were changed

(*r*) And see *Bench v. Merrick*, 1 C. & K. 463 ; *Young v. Murphy*, 3 Scott, 379. [See *Palmer v. Andrews*, 7 Wend. 142 ; *Snowman v. Wardwell*, 32 Maine, 275. In an action by the woman, it is no defence for the man to prove that she had committed fornication with other men, if, at the time of making the contract, the defendant had knowledge of the misconduct. And the result is the same, if he continues an already existing contract to

marry, after knowledge of such misconduct has been received by him. He cannot prove such misconduct in defence. *Snowman v. Wardwell*, 32 Maine, 275.]

(*s*) See *Morton v. Fenn*, 3 Dougl. 211 ; [*Hodgkiss v. Hodge*, 38 Barb. 117.]

(*t*) *Leeds v. Cook*, 4 Esp. 257.

(*u*) *Baddley v. Mortlock*, 1 Holt N. P. C. 151.

(*v*) *Peake Add. C.* 103 ; *S. C.* Ib. 124.

after the time of making the contract, it was a good cause for either party to break off the connection. Lord Mansfield had held, that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her, without being liable to an action; and whether the infirmity was bodily or mental, the reason was the same. It would be most mischievous to compel parties to marry who could never live happily together."

But the authority of these *dicta* is now very questionable. And the better opinion would seem to be: that no infirmity, bodily or mental, which may supervene or be discovered after the making of a contract to marry, — unless it be *incapacity* on the part of the man, or *want of chastity* on the part of the woman, — can be relied upon by either, as a ground for refusing to perform such contract. (x) And it is clear that neither party can set up his or her own incapacity or want of chastity, as a ground for refusing performance of the contract. (y)

Again: it is a good plea to an action for the breach of a promise to marry, that, after the promise and before breach, the plaintiff absolved the defendant from his promise and the performance thereof. (z) And the fact of there having been, for a considerable period, a total cessation of intercourse and correspondence between the parties, is evidence in support of this plea. (a)

Discharge
from prom-
ise.

(x) See *Hall v. Wright*, E., B. & E. 746; *Baker v. Cartwright*, 10 C. B. N. S. 124.

(y) *Hall v. Wright*, E., B. & E. 746.

(z) *King v. Gillett*, 7 M. & W. 55.

(a) *Davis v. Bomford*, 6 H. & N. 245.

[As to the damages recoverable in an action brought by a woman for a breach of promise of marriage, it was held, in *Harrison v. Swift*, 13 Allen, 144, that the jury might take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of a marriage which would have given her a permanent home, and an advantageous establishment; and that if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections was to be considered as an additional element of damages; and

that they might take into consideration generally whatever mortification and pain of mind she suffered resulting from a refusal by the defendant to fulfill his promise. See *Berry v. Da Costa*, L. R. 1 C. P. 331; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Wells v. Padgett*, 8 Barb. 323; *Southard v. Rexford*, 6 Cowen, 254; *Bedell v. Powell*, 13 Barb. 183; *King v. Kersey*, 2 Carter, 402; *Greenleaf v. McColey*, 14 N. H. 303; *Tubbs v. Van Kleek*, 12 Ill. 446; *Sedgwick, Damages* (2d ed.), 368; *Kniffin v. McConnell*, 30 N. Y. 285; *Frost v. Knight*, L. R. 5 Exch. 322; *Hamlin v. Great Northern Railway Co.* 1 H. & N. 410, 411. As to the evidence admissible in mitigation of damages, see *Button v. McCauley*, 5 Abb. Pr. N. S. 29; *Palmer v. Andrews*, 7 Wend. 142.]

SECTION IV.

Contracts respecting Services and Works.

In General.

- | | |
|--|---|
| 1. By agents. | 8. Physicians. |
| 2. Apothecaries, surgeons, and chemists. | 9. Printers. |
| 3. Arbitrators. | 10. Servants. |
| 4. Attorneys. | 11. Sheriffs, and other ministerial officers. |
| 5. Authors. | 12. Surveyors. |
| 6. Builders and other workmen. | 13. Witnesses. |
| 7. Counsel. | |

1. Wherever there is a contract to perform any work, or to transact any business, the law implies an engagement on the part of the person undertaking to do the work, that it shall be performed with due care, diligence, and skill, according to the orders given and assented to; (*b*) and — where there is no agreement as to the price — a promise by the party who employed the workman, (*b*¹) to pay him, in money, a reasonable remuneration to be ascertained by a jury. (*c*) Nor will the fact of the work-

(*b*) *Streeter v. Horlock*, 7 Moore, 287; [*Wade v. Haycock*, 25 Penn. St. 382; *Vaugh v. Shunk*, 20 Penn. St. 130; *Story Bailments*, § 431. Ordinary or due skill means that degree of skill which men engaged in the particular art, usually employ. It does not mean that high degree of skill which belongs only to a few men of extraordinary endowments and capacities. *Vaugh v. Shunk*, 20 Penn. St. 130; *Story Bailments*, § 433. But a party who agrees to do certain work for another, upon materials to be furnished by the latter, is not responsible to him for defects in the article made, arising out of the unfitness of the materials furnished. *True v. Bryant*, 32 N. H. 241.]

(*b*¹) { Where the plaintiff performed services for a neighbor at the request of the defendant, and it was known to the plaintiff that the defendant acted only as the friend and agent of his neighbor, he can sustain no action against the defendant for compensation. *Batchelder v. McKenney*, 36 Maine, 555.]

(*c*) *Brown v. Nairne*. 9 C & P. 205;

Peacock v. Peacock, 2 Camp. 45. [And even where there has been no contract, but the work has been performed by one, through compulsion, for another, whom the former was under no legal or moral obligation to serve, the law will raise a promise on the part of the person benefited to make the former a reasonable recompense. *Peter v. Steel*, 3 Yeates, 250. Where a married man represents himself to be a widower, and thus induces a woman to marry him, his wife being still alive, such woman may recover of him for her services during such time as she may live with him. *Higgins v. Breen*, 9 Missou. 497. Unless there be a promise to pay, there must be a request or something else, from which the law may infer a promise, to support an action for work and labor. Where labor is performed for the benefit of another without his express request, yet if he knows of the work and tacitly assents to it, an implied promise will arise to pay a reasonable compensation. *James v. Bixby*, 11 Mass. 34; *Farmington Academy v. Allen*, 14 Mass. 174; *Lewis v.*

man demanding more than a reasonable price, or refusing to deliver a chattel on which he has bestowed his labor, except on payment of such larger price, preclude him from afterwards suing for and recovering a reasonable price. (*d*) But where a specific price has been agreed upon, a subsequent promise, without any new consideration, to pay an additional sum for the same services, is *nudum pactum*. (*e*)

Where, however, it is expressly agreed between the parties, that the work shall be done *gratuitously*, the contract is *nudum pactum*, and the party undertaking to execute the work is not bound to enter upon or perform it; although, as we have seen, he becomes liable if, having actually entered on the employment, he be guilty of any *misfeasance* in the course thereof, to the injury of the other party. (*f*)

Trickey, 20 Barb. 387; Lynch v. Bogy, 19 Miss. 4 (Bennett) 170. But see Guild v. Guild, 15 Pick. 129. Where one employs the slave of another, the law implies a promise to pay the master for the services of the slave. Cooke v. Husted, 12 John. 188. So of an apprentice. Bowes v. Tibbetts, 7 Greenl. 457; James v. Le Roy, 6 John. 274. See Ayer v. Chase, 19 Pick. 556; Campbell v. Cooper, 34 N. H. 49. But labor and service voluntary done by one for another, without his privity or consent, however meritorious or beneficial it may be to him, as in saving his property from destruction by fire, affords no ground for an action. Bartholomew v. Jackson, 20 John. 28; Hertzog v. Hertzog, 29 Penn. St. 468; Mason v. Ship Blaireau, 2 Cranch, 266. This differs from cases of salvage, Marshall C. J. 2 Cranch, 266. So, if a workman be employed to do a particular job, and he chose to perform some additional work without consulting his employer, he cannot recover for such additional work. Hort v. Norton, 1 McCord, 22. But if the employer should pay for such voluntary services, he cannot recover back the money. Chadwick v. Knox, 31 N. H. 226. If a party promises another, who has without solicitation voluntarily performed services for him, that he will work for him in payment for these services, and thereupon begins and continues to

labor for him to that amount, he cannot recover for such labor. Chadwick v. Knox, *ubi supra*; Rennell v. Kimball, 5 Allen, 364.]

(*d*) Hughes v. Lenny, 5 M. & W. 183.

(*e*) Harris v. Watson, Peake, 72; Brown v. Cramp, 1 Marsh. 567; Newman v. Walters, 3 B. & P. 612; [Pendleton v. Empire Stone Dressing Co. 5 Smith (N. Y.), 13; Hodges v. The Rutland & Burlington R. R. Co. 29 Vt. 220. Where one contracting party refuses to fulfil his agreement, and the other makes a new promise on condition that he will go on with it, the latter promise is not void for want of a consideration. Munroe v. Perkins, 9 Pick. 305; Holmes v. Doane, 9 Cush. 135; Lattimore v. Harsen, 14 John. 330; Blood v. Enos, 12 Vt. 625. Where a joint contract was made by two persons, for a certain price, to erect a church, and was by them abandoned, a contract by one of the building committee, in his own right, with one of the contractors alone, to erect said house at the same price, and he to pay the additional actual cost, is binding. Morrison v. Heath, 11 Vt. 610. See Adams v. Hill, 16 Maine, 215.]

(*f*) See Elsee v. Gatward, 5 T. R. 143; Rex v. Kilderby, 1 Wms. Saund. 312 c, note (2); [Rutgers v. Lucet, 2 John. Cas. 92; Thorn v. Deas, 4 John. 83.]

Right of action in respect of.

And a contract to render services is not binding, if there be no corresponding obligation to receive them. (*g*)

Nor can an action be maintained for services performed upon an understanding that the plaintiff was to make no charge, but that he should receive a legacy at the death of the person to whom they were rendered. (*g*¹) But the mere fact of their having been performed in the *expectation* of receiving a legacy, will not take away the plaintiff's right of action. (*h*)

(*g*) See *Pilkington v. Scott*, 15 M. & W. 557; *Hartley v. Cummings*, 2 C. & K. 433; *Sykes v. Dixon*, 9 A. & E. 193.

(*g*¹) [*Little v. Dawson*, 4 Dall. 111; *Lee v. Lee*, 6 Gill & J. 309; *Livingston v. Acketron*, 5 Cowen, 531; *Higginson v. Fabre*, 3 Desaus. 91; *Ehle v. Judson*, 24 Wend. 98, 99; *Eaton v. Benton*, 2 Hill, 576; unless rendered at the *request* of the testator; *Roberts v. Swift*, 1 Yeates, 209; or unless there has been a promise to pay for the services, either before or after the services have been performed. *Snyder v. Castor*, 4 Yeates, 353, 358; *Ehle v. Judson*, 24 Wend. 98, 99; *Baxter v. Gray*, 4 Scott N. R. 374. If personal services be rendered by one person for another, at the request of the latter, an action will lie for them, unless it appears from the whole evidence that they were designed to be *gratuitous*, and this is matter of fact to be found by the jury. *Newell v. Keith*, 11 Vt. 214. A man turned away his wife and daughter without any provision. After many years he solicited his daughter to come and live with him; and promised by letter, that on her doing so she should heir his estate. She accepted his invitation. Her father subsequently drove her away, and upon his death bequeathed all his estate to others. The daughter sued the executors, under her father's written promise, and was decreed to be entitled to the estate. *Gary v. James*, 4 Desaus. 185. See *Jacobson v. Le Grange*, 3 John. 199; *Patterson v. Patterson*, 13 John. 379. Where one party has rendered services for another, and it is manifest, from the circumstances of the case, that it was understood by both parties that compensation should be made by will, and none is made, an action lies

to recover the value of such services. *Martin v. Wright*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576; *Quackenbush v. Ehle*, 5 Barb. 469. But where, in such case, a legacy is left by a debtor to his creditor, of an amount equal to or greater than the debt, it will be presumed to be in satisfaction of it. *Eaton v. Benton*, 2 Hill, 576. But if the legacy was agreed to be of a certain amount, or a certain piece of land was to be devised, in payment for the services, the value of the land or the amount of the legacy would seem to furnish the measure of damages, in case of a breach of the contract. *Jack v. McKee*, 9 Barr, 235; *Bash v. Bash*, 9 Barr, 260. This would be true only where the action was on the contract and the contract one that might be enforced. But where the services had been performed in consideration of an agreement, not in writing, that the employer should convey or devise land in payment for them, and the action was brought on a *quantum meruit* for the services, it was held, that the value of the land was not the fixed measure of damages, although such value is competent evidence to be considered by the jury upon the question of damages. *Ham v. Goodrich*, 37 N. H. 185.]

(*h*) *Baxter v. Gray*, 3 M. & G. 771; 4 Scott N. R. 347; and see *Osborn v. Governors of Guy's Hospital*, Str. 728; *Le Sage v. Coussmaker*, 1 Esp. 188. It seems that if the defendant give any evidence which raises a doubt, as to whether the plaintiff was to be entitled to a remuneration for his services, the onus of proving that he was so entitled lies on the plaintiff. *Hingeston v. Kelly*, 18 L. J. Exch. 360.

So, where a person performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made *as should be deemed right*;" it was held, that an action could not be maintained to recover a reward for such work; the resolution importing, that the committee were to judge whether any remuneration had been earned. (*i*)

So, it has been laid down, that if a person take a journey to become bail for another, he cannot maintain an action against him for his trouble or loss of time in such journey; because he did not undertake the journey as work and labor, or as a person employed by the defendant; but he did it as his friend, and to do him a kindness. (*k*)

So, trustees and executors, acting in those characters in the execution of the trusts confided to them, cannot charge for their trouble or loss of time, even although they happen to be solicitors. (*l*) And a director of a company incorporated by a statute, — which provides that the directors shall manage the affairs of the company, and which gives power to make by-laws under seal, — cannot sue the company for his services in attending courts, or the like; although there be a resolution of the court under seal that each director shall have a certain remuneration; the statute being silent as to reward. (*m*)

But where the contract was: "I hereby agree to enter your service as weekly manager, commencing on Monday, and the amount of payment I am to receive I leave entirely to you;" it was held that it was thereby implied that the plaintiff was, at all events, to be paid something for the services to be performed. (*n*)

(*i*) *Taylor v. Brewer*, 1 M. & S. 290; and see *Roberts v. Smith*, 4 H. & N. 315. As to the case of a party contracting to do work, on the credit of a particular fund; see *Landman v. Entwisle*, 7 Exch. 638.

(*k*) *Per Peak J. Reason v. Wirdnam*, 1 C. & P. 434.

(*l*) 1 Chit. Gen. Prac. 551, 553; 2 Ib. 17; citing *Carmichael v. Wilson*, 4 Bligh, 145, *contra*. [But compensation is generally allowed to trustees, executors, guardians, and others holding like offices of trust in the American states. *Perry Trusts*, §§ 917-919, and notes.]

(*m*) *Dunstan v. The Imperial Gas Light Company*, 3 B. & Ad. 125.

(*n*) *Bryant v. Flight*, 5 M. & W. 114; *Parke B. diss.* [See *United States v. McDaniel*, 7 Peters, 1; *United States v. Ripley*, 7 Peters, 18; *United States v. Fillebrown*, 7 Peters, 28.] On an agreement to serve a person, at such salary as he should think right, no action lies, if there has been no application to him to fix the salary. *Owen v. Bowen*, 4 C. & P. 93. An action lies to recover a reward offered by an association or private individual on the apprehension, &c., of a felon or other offender. See *Neville v. Kelly*, 12 C. B. N.

So, where the plaintiff was requested by the defendant to show his house, which was to let; and the defendant promised to make the plaintiff a handsome present; it was held, that he was entitled to recover a reasonable compensation for that service. (*o*) And where A. entered into the employ of B., under an agreement that, if he was approved of, B. would take him as an apprentice; and, after serving B. for two years, the contract for an apprenticeship was rescinded; A. was held to be entitled to a remuneration for his labor during that period. (*p*)

2. To maintain an action for work and labor, however, the plaintiff must prove a performance of the work according to the terms of the contract; (*p*¹) or if he has deviated from those terms, he must show that the defendant acquiesced in such deviation. (*q*)

When the right of action in respect of, accrues.

Where a party undertakes to work up the materials of another, his right of action arises so soon as he has done the work satisfactorily, and has given the other party an opportunity of ascertaining whether it has been properly done. (*r*)

A person may, however, by express agreement, not only render the amount of remuneration which is to be paid, dependent on the amount of contingent benefit to be derived by the employer; (*r*¹) but he may defer the period when his right to receive the reward shall accrue, until the employer has actually *obtained* a given advantage. Thus, in *Bull v. Price*, (*s*) the plaintiff, a surveyor, was retained by the defendant, to negotiate with the commissioners of

S. 740; *Tarner v. Walker*, L. R. 1 Q. B. 641; 2 *Ib.* 301; *Thatcher v. England*, 3 C. B. 254; *Smith v. Moore*, 1 C. B. 438; *England v. Davidson*, 11 A. & E. 856; *Lancaster v. Walsh*, 4 M. & W. 16; *Williams v. Carwardine*, 4 B. & Ad. 621; [*ante* 11, note (*u*¹).] Or discovering a lost child; *Fallick v. Barber*, 1 M. & S. 108.

(*o*) *Jewry v. Busk*, 5 Taunt. 302.

(*p*) *Phillips v. Jones*, 1 A. & E. 333.

[But where a father binds his minor son as an apprentice, by a contract not conformable to the provisions of law in reference to apprenticeships, so that the contract is voidable by the son, and he avoids it after having served a portion of the time stipulated in the contract, the law will not imply a promise by the master to pay the

father for the services of the son during such portion of the time, if, by the terms of the contract, nothing was to be paid for his services during the whole period thereof. *Page v. Marsh*, 36 N. H. 305.]

(*p*¹) [*Hill v. Millburn*, 17 Maine, 316.]

(*q*) *Cooper v. Langdon*, 9 M. & W. 60, 67; *Hayden v. Hayward*, 1 Camp. 180; [*Story Bailm.* § 441 b; *Hill v. Millburn*, 17 Maine, 316; *Clark v. Smith*, 14 John. 326.]

(*r*) Per Maule B. *Hughes v. Lenny*, 5 M. & W. 183, 193.

(*r*¹) [See *Smith v. Hyde*, 19 Vt. 54; *Mock v. Kelly*, 3 Ala. 387; *Spencer v. King*, 5 Ham. 183.]

(*s*) 7 Bing. 237.

woods and forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of 2l. per cent. "on the sum which might be *obtained*, either by treaty, arbitration, or trial by jury." Private treaty having proved unavailing, a jury was impanelled, by whom the value of the property was assessed at 4,000l.; but in consequence of a defect in the defendant's title, — arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, — the money was not paid to her, but was placed in the hands of the accountant-general, to await the adjustment of the difference. The plaintiff was not previously aware of the existence of this charge; but it was held, nevertheless, that he was not entitled to his commission, until the money awarded was *actually received* by the defendant; (s¹) and Tindal C. J. observed: "It has been contended that this construction would leave it in the power of the defendant to delay the plaintiff for an indefinite period, or to defeat his claim altogether by neglecting to receive the sum his exertions had entitled her to. That, however, is not a legal consequence. On general principles, a fraudulent delay on the part of the defendant to receive that which has been awarded her, would not constitute a defence. If she had neglected to receive the sum found to be due to her, or had done anything wilfully to prevent the immediate settlement, she undoubtedly could not set up that in answer to the action."

But where the defendant promised to pay the plaintiff 5l., "if he would provide a tenant for certain premises, and get him 350l. for his lease;" and the plaintiff procured one S., with whom the defendant entered into an agreement, and received 50l. as a deposit; it was held that, — although S. was unable to complete his engagement, and the defendant afterwards consented to release him from it, retaining, however, the 50l., — the plaintiff was entitled to recover the 5l., because he had substantially performed his contract. (t)

3. A workman who has bestowed labor and skill in the improvement of a chattel bailed to him, has a *lien* thereon for the remuneration due to him, whether the amount was fixed by the express agreement of the parties or not. (u) So,

(s¹) [See *Robinson v. New York Ins. Co.* 2 Caines, 357; *Miller v. Livingston*, 1 Caines, 349.]

(t) *Horford v. Wilson*, 1 Taunt. 12.

(u) *Steadman v. Hockley*, 15 M. & W. 553, 556; per Parke B. *Jackson v. Cum.*

where a chattel is delivered to a workman, under a contract to perform certain work thereon at an entire price; and, before the work is completed, the order is countermanded, he has a lien on the chattel for the price of the work actually done. (x) And the workman's lien attaches on chattels delivered to him in different parcels, and at different times, provided the work done thereon was done under one entire agreement. (y)

But it seems that no lien exists if, by the bargain, a future day of payment was agreed upon; for, in such case, the detention of the chattel would be inconsistent with the terms of the contract. (z)

mins, 5 M. & W. 342, 349; *Scarfe v. Morgan*, 4 M. & W. 270, 283; *Bevan v. Waters*, Moo. & M. 235; [*Hollingsworth v. Dow*, 19 Pick. 228; *Burdick v. Murray*, 3 Vt. 302; *Partridge v. Trustees of Dart. Coll.* 5 N. H. 286; *Grinnell v. Cook*, 3 Hill, 491. See *Moore v. Hitchcock*, 4 Wend. 292; *Townsend v. Newell*, 14 Pick. 332. But where one, who had contracted to finish a machine, employed a mechanic, without the knowledge of the owner, to perform the work, disclosing to him the contract with the owner, it was held, that such mechanic did not acquire a lien in his own right, for his labor on the machine, as against the owner, although the owner knew that he was performing the work, while it was in progress. *Hollingsworth v. Dow*, 19 Pick. 228. The lien of a workman upon an article manufactured by him, is lost by a voluntary abandonment of the possession of the property. *King v. Indian Orchard Canal Co.* 11 Cush. 231; *Morse v. Androscoggin R. R. Co.* 39 Maine, 285. This lien is not in its nature assignable. *Bradley v. Spofford*, 23 N. H. 446, 447; *D'Aubigny v. Duvall*, 5 T. R. 606.] A certificated conveyancer has no lien for his charges, on deeds delivered to him, "with and in respect of" which he does certain business for the owner of the deeds. *Steadman v. Hockley*, 15 M. & W. 553. Nor has an auctioneer a lien on a mortgage deed, which was delivered to him for the purpose of obtaining payment of a sum of money due thereon. *Sanderson v. Bell*, 2 C. & M. 304. [But an auctioneer has a lien on the price of property sold by him

for his commissions and charges. *Robinson v. Rutter*, 4 El. & Bl. 954; *Coppin v. Craig*, 7 Taunt. 240.] A livery-stable keeper has no lien, for the keep of a horse delivered to him in the way of his trade. *Judson v. Etheridge*, 1 C. & M. 743; *Wallace v. Woodgate*, R. & M. 193; [*Miller v. Marston*, 35 Maine, 153;] or for money paid by him at the request of the owner, for the attendance of a veterinary surgeon upon the horse. *Orchard v. Rackstraw*, 9 C. B. 698. Nor has an agister of cattle any lien thereon, except by express agreement. *Jackson v. Cummins*, 5 M. & W. 342; *Chapman v. Allen*, Cro. Car. 271; [*Goodrich v. Willard*, 7 Gray, 183; *Miller v. Marston*, 35 Maine, 155; *Grinnell v. Cook*, 3 Hill, 491, 492.] But a trainer has a lien on a horse delivered to him to train. *Forth v. Simpson*, 13 Q. B. 680; 18 L. J. Q. B. 263; *Jacobs v. Latour*, 5 Bing. 130. And the owner of a stallion, which is used to cover a mare, has a lien on the mare for his charge for the use of the stallion. *Scarfe v. Morgan*, 4 M. & W. 270. [So, if a person takes a lame or sick horse to keep and cure, he has a lien on the horse for his cure and keeping. *Lord v. Jones*, 24 Maine, 439.] It would seem that a workman who is employed to weigh or measure a chattel, has a lien thereon for his charge. See per Pollock C. B. and Rolfe B. *Steadman v. Hockley*, 13 M. & W. 553, 556; *Hollis v. Claridge*, 4 Taunt. 308.

(x) *Lilley v. Barnsley*, 1 C. & K. 344.

(y) See *Marks v. Lahee*, 4 Scott, 137.

(z) *Chase v. Westmore*, 5 M. & S. 180; *Jacobs v. Latour*, 5 Bing. 130.

Nor has the workman any lien, for the cost of taking care of a chattel while work is being done thereon. (*a*)

Nor does the right of lien confer the right to sell the chattel on which the lien exists. (*b*)

And if, after the work has been completed, the workman relinquishes possession of the chattel, he cannot afterwards detain it as a lien for the sum due to him on account of his work. (*c*)

1. Agents. (*d*)

There are some classes of agents, whose right to commission or reward for their trouble is regulated by the custom or usage of the particular trades in which they are in the habit of transacting business; (*e*) and where such a custom exists, it is presumed, in the absence of any express agreement to the contrary, that the parties contracted for the reward due by the custom. But if there be no proof of such custom or agreement, then it is for a jury to estimate the value of the services rendered. (*f*)

(*a*) *British Empire Shipping Co. v. Somes, E., B. & E.* 353; *S. C. in Dom. Proc.* 30 L. J. Q. B. 229. [So, where a party has failed to perform fully what he has agreed to do in reference to goods, he has no lien on them. *Hodgdon v. Waldron*, 9 N. H. 66.]

(*b*) *Thames Iron Ship Building Co. v. Patent Derrick Co.* 29 L. J. C. 714; [*Doane v. Russell*, 3 Gray, 382; 2 Kent, 642.]

(*c*) *Hartley v. Hitchcock*, 1 Stark. 408.

(*d*) *Russell on Factors*, 154, 164.

(*e*) As a London broker selling colonial produce; *Eicke v. Meyer*, 3 Camp. 412; or a London ship-broker chartering a ship, &c. *Brown v. Nairne*, 9 C. & P. 204; *Cohen v. Paget*, 4 Camp. 96. Broker can charge his principal only the cost price of articles purchased for him, and his commission. *Procter v. Brain*, 2 M. & P. 284. The mere introduction of the contracting parties to each other will not entitle the agent to his commission. But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale was not effected by him. *Per Erle C. J. Green v. Bartlett*, 14 C. B. N.

S. 681, 685; *Wilkinson v. Martin*, 8 C. & P. 1, 5; *Burnett v. Bouch*, 9 C. & P. 620; [*Rice v. Mayo*, 107 Mass. 550.] And where the bargain goes off through the default of the principal, the agent may recover a compensation for his services, in an action on the common counts, even although there was a special agreement as to commission. *Prickett v. Badger*, 1 C. B. N. S. 296. The actual earning of freight under a charter-party, is not a condition precedent to the right of a ship-broker to his commission for procuring the execution of the charter. *Hill v. Kitching*, 3 C. B. 299. But it would appear to be otherwise if the bargain goes off entirely, and the ship is not employed. *Read v. Rann*, 10 B. & C. 438; *Broad v. Thomas*, 7 Bing. 99. A spirit broker offering rum for sale. *Stewart v. Kahle*, 3 Stark. 161.

(*f*) *Per Alderson B. Brown v. Nairne*, 9 C. & P. 205. The French law is otherwise: "*Le mandat est gratuit, s'il n'y a convention contraire.*" *Code Civil*, book 3, tit. 3, c. 1. [See *Harrison v. Larg*, 4 De-saus. 110; *Poag v. Poag*, 1 Hill, 287. Besides the means of indemnity which all agents have by action or set-off, the law allows to factors the additional security of

And a *del credere* agent is one who, for a higher commission, *Del credere agent.* *guaranties* to his principal the due payment of the price of the goods sold by the agent to third persons. (*g*)

But where, by reason of the misconduct, negligence, or unskillfulness of the agent, the principal derives *no* benefit *When lost by negligence;* whatever from the acts of the latter, he is not entitled to claim his commission in respect thereof. (*h*)

Therefore, where a broker who had purchased goods for his principal on credit, was induced by the vendor to delay the delivery till the credit had expired, when the buyer refused to receive them; it was held, that the broker could not claim his commission. (*i*) So, if a factor has been guilty of misconduct in selling the goods of his principal, he is not entitled to deduct for his commission, in an action for money had and received to the use of his principal. (*k*) And if an auctioneer employed to sell an estate, be

a *lien* upon property in their hands. And they have not only a particular lien, or right to retain the thing itself, in respect of which the claim arises, but also a general lien, or right to hold, not only for demands specifically arising out of the thing retained, but also for the general balance of accounts, including responsibilities incurred in the execution of their agencies. *Knapp v. Alvord*, 10 Paige, 205; *Holbrook v. Wight*, 24 Wend. 169. See *Dunlap's Paley's Agency*, 127 *et seq.* and notes; *Burrill v. Phillips*, 1 Gallison, 350; *Peisch v. Dickson*, 1 Mason, 9; *Corleis v. Cumming*, 6 Cowen, 184; *Holley v. Huggeford*, 8 Pick. 73, 77; *Bryce v. Brooks*, 26 Wend. 367; *Williams v. Littlefield*, 12 Ib. 362; *Stevens v. Robins*, 12 Mass. 180; *Matthews v. Menadger*, 2 McLean, 145, as to this right of agents, and what class of them may exercise it. *Story Agency*, § 351 *et seq.*; 2 Kent, 634-642; *Jordan v. James*, 5 Ham. 99; *Williams v. Littlefield*, 12 Wend. 362. Where a factor had indorsed bills of exchange for his principal, this liability, with a reasonable apprehension of danger, gave him, as a factor, a lien on a bill then in his hands belonging to his principal, to meet the event of his indorsements; and the circumstance of the factor's receiving a commission on the indorsement of bills

is not viewed as in any way affecting the general question, as to his lien as factor. *Hodgson v. Payson*, 3 Harr. & J. 339; *Bradford v. Kimberly*, 3 John. Ch. 434; *Murray v. Tolland*, 3 John. Ch. 573; *Hendricks v. Robinson*, 2 John. Ch. 309.]

(*g*) See *ante*, 274. Common count for such commission. *Carruthers v. Graham*, 14 East, 578; *Solly v. Weiss*, 8 Taunt. 371; [*Paley's Agency*, by *Dunlap*, 41, and note; *Story Agency*, § 328.]

(*h*) *White v. Chapman*, 1 Stark. 113; *Shaw v. Arden*, 9 Bing. 287, 290. [See, also, *Stewart v. Kahle*, 3 Stark. 161; *Story Agency*, § 331; *Dodge v. Tileston*, 12 Pick. 328; *Tindal C. J.* in *Shaw v. Arden*, 9 Bing. 287; *Clark v. Moody*, 17 Mass. 152; *Paley's Agency*, by *Dunlap*, 105, 106, and notes.]

(*i*) *Hurst v. Holding*, 3 Taunt. 32.

(*k*) *White v. Chapman*, 1 Stark. 113. [A consignee or factor, making advances on the goods of his consignor, or principal, to an amount even beyond their value, is yet bound to obey the instructions of the latter, as to the time of sale, though there be no agreement to that effect. And if, being instructed to sell immediately, he refuse the first offer, in expectation of a more favorable market, and afterwards sell at less than the offer, he cannot recover from his principal more

guilty of negligence or unskilfulness, whereby the sale becomes nugatory, he is not entitled to recover from the vendor any compensation for his trouble. (*l*)

But if the principal derive any benefit from the act of his agent, the latter is entitled to a proportionate compensation. (*m*) And it appears to have been the opinion of Lord Kenyon, that an agent who acts in the affairs of his principal, *bonâ fide*, and on the best advice he is able to obtain, is not liable for the consequences. (*n*)

An agent cannot recover a commission upon any transaction which is, in itself, necessarily illegal, *e. g.* for effecting a sale of shares in an illegal association or undertaking. (*o*) But he may recover commission for doing an act for his principal, although such act would be illegal if certain requisites were not afterwards complied with by the principal, — the agent not being employed to perform them ; as for obtaining an insurance on a voyage for which a license is necessary. (*p*)

So, a person who acted in London as a sworn broker, but who was not qualified to act as such, according to the provisions of the 6 Anne, c. 16, could not recover his com- London broker.

than the difference between his advance and the amount the goods would have brought, if he had sold when he ought, even though he acted in perfect good faith. *Bell v. Palmer*, 6 Cowen, 128. See *Upham v. Lefavour*, 11 Met. 174.]

(*l*) *Denew v. Daverell*, 3 Camp. 451 ; *Jones v. Nanney*, M'Clel. 25. [See *Dodge v. Tileston*, 12 Pick. 328 ; *Howe v. Dewing*, 2 Gray, 476 ; *Hamond v. Holiday*, 1 C. & P. 384 ; *Hicks v. Minturn*, 19 Wend. 550.]

(*m*) Per Best C. J. *Hamond v. Holiday*, 1 C. & P. 384 ; *Russell on Factors*, 187.

(*n*) See *Miles v. Bernard*, Peake Add. Cas. 61. See, however, per Abbott C. J. *Money Penny v. Hartland*, 1 C. & P. 352, 354. [An agent, without reward, will not be required to use more diligence than would be used by a prudent man in the management of his own concerns. *Pate v. M'Clure*, 4 Rand. 164.]

(*o*) *Josephs v. Pebrer*, 3 B. & C. 639. See, as to transactions within the 7 & 8

Vict. c. 110, the repealed "Joint Stock Companies Registration Act," *Young v. Smith*, 15 M. & W. 121 ; *Loonie v. Oldfield*, 9 Q. B. 590 ; *O'Neil v. Brindle*, Ib. 582, 592.

(*p*) *Haines v. Busk*, 5 Taunt. 521 ; *Fomin v. Oswell*, 3 Camp. 357 ; [Paley's Agency, by Dunlap, 102, and notes. In a case between a principal and his agent, in which the latter seeks to shelter himself behind his own illegal act, in an illegal transaction, the reason as to constructive knowledge does not hold and the law will not, on the principle of constructive notice, work injustice, by subjecting the principal to the consequences of an illicit transaction, whether he had any participation in it or not, to enable the agent, the actual violator of the law, and entitled to no favor, to take advantage of his own wrong, and cheat his employer. *Chappell v. Wysham*, 4 Harr. & J. 560. See *Story Agency*, § 330 *et seq.*]

mission. (q) But he might recover his advances. (r) And the same rule will apply to a broker, who is admitted to practice in London under the 33 & 34 Vict. c. 60, s. 5.

So, a person who acts as an appraiser cannot recover his commission, if he be not duly licensed under the 46 Geo. 3, c. 43, s. 5. (s)

[An agent is liable to his principal for injuries that are caused by want of reasonable skill and ordinary diligence, but not for injuries that are caused by his mistake in a doubtful matter of law. (s¹)

Where an agent, acting *bonâ fide* and without fault in the proper service of his principal, is subjected to expense, or is sued on any contract made by him, or for any act done pursuant to his authority, the law implies that the principal will indemnify and reimburse him for the expense.] (s²)

(q) *Cope v. Rowlands*, 2 M. & W. 149; and see *Milford v. Hughes*, 16 M. & W. 174. A ship-broker was held not to be within the statute of Anne. *Gibbons v. Rule*, 4 Bing. 301. And if a broker was duly qualified to act under that statute, he could recover his commission, although the transaction in respect of which he claimed it involved a breach of the regulations, under which he was admitted to act as a broker, by the court of mayor and aldermen. *Kemble v. Atkins*, Holt N. P. C. 427. The right to make or enforce these regulations is taken away by the 33 & 34 Vict. c. 60, s. 2.

(r) *Smith v. Lindo*, 5 C. B. N. S. 587; *Pidgeon v. Burslem*, 3 Exch. 465; and see *Jessop v. Lutwyche*, 10 Exch. 614.

(s) *Palk v. Force*, 12 Q. B. 666.

(s¹) [*Mechanics' Bank v. Merchants' Bank*, 6 Met. 13. In this case, the holder of a post note, which was issued by a bank that failed before the note fell due, sent it to another bank for collection, and this bank caused payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due without grace, whereby the indorsers were discharged on the ground that, by law, the promisors were entitled to grace on the note, although they had, while solvent, paid such notes without grace; the holder thereupon brought an action against the collecting bank to recover damages for

negligence in not making such demand, and giving such notice, as would hold the indorsers. It appeared on the trial, that at the time the note fell due, the question whether banks were entitled to grace on their post notes had never been decided, and there was no uniform practice as to demanding payment of such notes, and giving notice to indorsers, after the promisors failed. It was held, that the action could not be sustained. So, where an auctioneer, in making an entry of a sale in his sale book, omitted to comply with the requirements of the statute (of New York), regulating sales at public auction, in consequence of which the sale could not be enforced, and the owner of the property suffered a loss on a resale, it was held, that the auctioneer, being liable only for gross negligence or ignorance, was not answerable in damages, the statute having been recently passed, being of doubtful construction, and not having received a judicial interpretation. *Hicks v. Minturn*, 19 Wend. 550. See *Howe v. Dewing*, 2 Gray, 476.]

(s²) [*Powell v. Newburgh*, 19 John. 284; *Story Agency*, §§ 339 *et seq.*; *Hill v. Packard*, 5 Wend. 375; *Rogers v. Kneeland*, 10 Wend. 219; *Greene v. Goddard*, 9 Met. 212; *Stocking v. Sage*, 1 Conn. 522; *D'Arcy v. Lyle*, 5 Binn. 441; *Ramsay v. Gardner*, 11 John. 439; *Gower v. Emery*, 18 Maine, 79.]

2. Apothecaries and Surgeons.

1. By the 21 & 22 Vict. c. 90, s. 32, as amended by the 23 Vict. c. 7, s. 3, it is enacted that, after the 1st day of January, 1861, no person shall be entitled to recover any charge in any court of law, for any medical or surgical advice, or attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial, that he is registered under that act. (*t*)

Provisions of
"The Medical Act."

And this section applies not only to cases where the patient is sued; but also to cases where the action is brought against a third person, by whom the medical man was employed. (*u*)

But if the plaintiff prove that he is duly registered at the time of the trial, that will be sufficient; and he will be entitled to recover, although he was not registered at the time of the attendances, &c., in respect of which the action is brought. (*x*)

And where a business was carried on by two partners, one of whom was registered as a surgeon and apothecary, and the other as a surgeon only; it was held that they might recover on a joint claim for medicine and attendances; the attendances by both having been given, except in a few instances, in the character of apothecaries only. (*y*)

2. *Chemists and druggists* (*z*) are confined in the due exercise of their business, to the preparing, compounding, dispensing, and vending of drugs and medicines, and medicinal compounds. (*a*) They cannot, therefore, give advice to, or attend a patient, or administer medicines for profit; nor can they recover for the value of such medicines, unless they are qualified to act as apothecaries or surgeons. (*b*)

Chemists and
druggists.

(*t*) This section applies only to cases where the work was done after the act came into operation. *Wright v. Greenroyd*, 1 B. & S. 758; 31 L. J. Q. B. 4; and see *Thistleton v. Frewer*, 31 L. J. Exch. 230.

(*u*) *De La Rosa v. Prieto*, 16 C. B. N. S. 578.

(*x*) *Turner v. Reynal*, 14 C. B. N. S. 328.

(*y*) *Ib.*

(*z*) By the 31 & 32 Vict. c. 121, s. 1, it

is made unlawful for any person, from and after the 31st of December, 1868, to assume or use the title of chemist and druggist, or chemist, or druggist, or pharmacist, or dispensing chemist, or druggist, in any part of Great Britain, unless, *inter alia*, he be registered under that act.

(*a*) See 55 Geo. 3, c. 194, s. 28, and 31 & 32 Vict. c. 121, s. 3.

(*b*) See *Richmond v. Coles*, 1 Dowl. N. S. 560; per Best C. J. and Park J. *Allison v. Haydon*, 1 M. & P. 592, 593.

3. The law implies an undertaking on the part of apothecaries and surgeons, that they will use reasonable care and skill in the treatment of their patients. (*c*) This is the implied duty of a medical practitioner; and he is responsible to his patient for the breach of it as for a tort; (*c*¹) although the patient was not the party who retained, or was to remunerate him. (*d*) And for gross carelessness or unskilfulness an action lies, although no reward was to be given. (*e*)

So, if the patient be rather injured than benefited, in consequence of any gross unskilfulness or carelessness on the part of his medical attendant, an action for fees cannot be maintained. (*f*) And although, in ordinary cases, the claim to remuneration does not de-

(*c*) *Slater v. Baker*, 2 Wils. 359; *Seare v. Prentice*, 8 East, 348; [*Leighton v. Sargent*, 27 N. H. 469; S. C. 31 N. H. 119; *McCandless v. McWha*, 22 Penn. St. 261; *Smothers v. Hanks*, Sup. Ct. (Iowa) 7 Am. Law Rev. 172, 173.]

(*c*¹) [*Landon v. Humphrey*, 9 Conn. 209; *Bowman v. Woods*, 1 Iowa (Greene), 441; *Leighton v. Sargent*, 31 N. H. 119. Physicians and surgeons are not liable for want of the highest degree of skill in the performance of operations coming within the line of their duty. *Howard v. Grover*, 28 Maine, 97; *Simonds v. Henry*, 39 Maine, 155; *Leighton v. Sargent*, 27 N. H. 460. Their implied engagement is not that they will certainly cure. *Gallagher v. Thompson*, Wright (Ohio), 466; *Leighton v. Sargent*, 27 N. H. 460. They are not responsible merely for want of success; nor for errors of judgment, or mere mistakes in matters of reasonable doubt and uncertainty; but their undertaking is, that they will use their best judgment in all cases of doubt, as to the best course of treatment. *Leighton v. Sargent*, 27 N. H. 460; *McCandless v. McWha*, 22 Penn. St. 261. See *Bemus v. Howard*, 3 Watts, 355; *Percy v. Millaudon*, 20 Martin, 68, 75.]

(*d*) *Gladwell v. Steggall*, 8 Scott, 60; *Pippin v. Sheppard*, 11 Price, 400.

(*e*) *Ante*, 667. In *Rex v. Joseph Senior*, who was tried before Bolland B. at the Chester Spring Assizes, April 10, 1832, for manslaughter in killing a child in the exercise of his occupation of a man-midwife,

the learned judge said: "That in the case of the second trial of *St. John Long*, at the Old Bailey, all the judges agreed, at a previous consultation, that if any medical man, whether regularly qualified or not, either by gross negligence, by tampering with the health of his patients, and by making experiments with new medicines of unknown powers, or by gross ignorance, shall cause death, he shall be legally answerable for the consequences; but if even a person, not regularly qualified to exercise the medical profession, but still having considerable experience and skill, and anxious to use that experience to the best of his knowledge and judgment, shall, by any mistake, so practice as to cause death, he shall not be legally answerable for it." See *Rex v. Long*, 4 C. & P. 398, 423; *Lamphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 C. & P. 81; [*Commonwealth v. Thompson*, 6 Mass. 134.]

(*f*) *Duncan v. Blundell*, 3 Stark. 6. [See *Piper v. Menifee*, 12 B. Mon. 465; *M'Clallen v. Adams*, 19 Pick. 333. But when such unskilfulness or carelessness is alleged in defence to a suit for fees, the burden is on the defendant to show it. *M'Clallen v. Adams*, 19 Pick. 333, 335.] "In the case of a medical man, if an operation which *might* have been useful, has merely failed in the event, he is nevertheless entitled to charge; but if it could be useful in *no event*, he could have no claim on the patient;" per Alderson J. *Hill v. Featherstonhaugh*, 7 Bing. 569, 574.

pend upon the question, whether a cure has been effected; (*f*¹) yet a person who professes to cure within a specific time, by means of sovereign medicines, and who, by false and fraudulent professions of skill and success, induces another to continue to employ him, cannot recover for medicines and attendance, if no benefit be derived therefrom. (*g*) But if improper remedies are adopted, or unfit medicines are administered under the advice of a physician, the surgeon or apothecary is, at all events, entitled to be paid. (*h*)

3. Arbitrators.

If there be a prior or subsequent express promise to pay an arbitrator for his trouble, it is clear he may maintain an action. (*i*) But it appears to be doubtful whether, in the absence of an express promise, an arbitrator can sue for remuneration. (*i*¹)

It is doubtful whether they can recover, except on an express contract.

In *Viranny v. Warne*, (*k*) Lord Kenyon is reported to have held, that the appointment of arbitrator was not of a nature to support a demand for payment, and that he was not entitled to recover any reward unless there was an express promise. *Dallas C. J.* however, in a case before him *nisi prius*, (*l*) seems to have been of a contrary opinion; and the question appears to be still undecided. (*m*)

(*f*¹) [*Gallagher v. Thompson*, Wright (Ohio), 466; *Leighton v. Sargent*, 27 N. H. 460; *Howard v. Grover*, 28 Maine, 97. But an engagement by a physician, that, if he does not perform a cure, he will claim no compensation for his services, is valid and binding on him; and in such case, he can claim nothing for his services or his medicines, unless he proves a cure to have been effected by him. *Smith v. Hyde*, 19 Vt. 54. In a case of this kind, it is not necessary that a specific price should be agreed upon; but if a cure is effected, the physician will be entitled to a reasonable compensation. *Moek v. Kelly*, 3 Ala. 387.]

(*g*) *Hupe v. Phelps*, 2 Stark. 480.

(*h*) *Kannen v. M'Mullen*, Peake, 59. See *Duncan v. Blundell*, 3 Stark. 6.

(*i*) *Hoggins v. Gordon*, 3 Q. B. 466, 474; *Hardres v. Prowd*, Styles, 465.

(*i*¹) [But in the United States arbitrators and referees have the same right to recover for their services as other persons for their

labor. *Hinman v. Hapgood*, 1 Denio, 188; *Hassinger v. Diver*, 2 Miles, 411; *Butman v. Abbot*, 2 Greenl. 361. If there are several referees, each may sustain a separate action for his services. *Butman v. Abbot*, *supra*; *Hinman v. Hapgood*, 1 Denio, 188. In *Butman v. Abbot*, *supra*, it is held, that the action must not be against both parties to the suit jointly, but only against the party making the demand.]

(*k*) 4 Esp. 47; and see *Burroughs v. Clarke*, 1 Dowl. 48.

(*l*) *Swinford v. Burn*, 1 Gow. 7, 8. See *Watson on Arbitr.* 68.

(*m*) The reasonableness of the amount of a fee which an arbitrator awards to be paid to himself, may be referred to the decision of the officer of the court. *Miller v. Robe*, 3 Taunt. 461; *Fitzgerald v. Graves*, 5 Ib. 342. See *George v. Lonsley*, 8 East, 13.

If, however, the arbitrator be a barrister, and he be employed in his professional character, he cannot recover any remuneration for his services, unless there be an actual contract to that effect; because, in such case, the claim would fall within the principle, that the employment of counsel is honorary, and that there is no implied contract for a pecuniary reward. (*n*)

4. Attorneys.

1. In an action on an attorney's bill, (*o*) it must appear that the

Attorney must give his personal attention to the client's business.

client has had the advantage of the attorney's personal advice; and, therefore, an attorney cannot recover fees in a suit in which the client consulted and retained the attorney's clerk, who lived at a distance from his princi-

(*n*) *Post*, 834.

(*o*) An attorney or solicitor may now make an agreement in writing with his client, as to the amount and manner of payment for the whole, or any part of any past or future services, fees, charges, or disbursements. 33 & 34 Vict. c. 28, ss. 4, 11, 12. The court or judge before whom any suit, matter, or proceeding has been heard, or is depending, may now order the attorney's costs to be made a charge on the property recovered or preserved. 23 & 24 Vict. c. 127, s. 28. As to the delivery and signature of an attorney's bill, a month before action brought thereon, and the taxation thereof, see 6 & 7 Vict. c. 73; *Curling v. Sedger*, 6 Scott, 678; *Tidd*, 9th ed. 325-335; *Wardle v. Nicholson*, 1 N. & M. 355; and *James v. Child*, 2 C. & J. 678. The 6 & 7 Vict. c. 73, s. 367, is retrospective in its operation. *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, Ib. 858. A bill for business done by one attorney, as agent for another, must now be delivered, signed, before action to recover it. *Billing v. Coppock*, 1 Exch. 14. An attorney or solicitor is not required to deliver a signed bill, for the amount due under an agreement made in pursuance of the 33 & 34 Vict. c. 28. See s. 15. An attorney is bound by his agreement to charge only money out of pocket, although he was misled by his client's statement as to his right of action. *Thwaites v. Mackerson*,

3 C. & P. 341; *S. C. Moo. & M.* 199. The master may tax his charges, though it was agreed he should be paid at a fixed rate. *Drax v. Scroope*, 2 B. & Ad. 581. See, also, 33 & 34 Vict. c. 28, ss. 4, 15. And where, by agreement, the attorney is to receive a fixed sum, the delivery of a signed bill merely charging that sum, is not a "delivery of a signed bill," within the 6 & 7 Vict. c. 73, s. 37; *Philby v. Hazle*, 8 C. B. N. S. 647. He may recover his bill for procuring an adjudication in bankruptcy, against a person who employed him so to do, but who was not petitioning creditor, although no assets are received. *Pocock v. Russen*, *Moo. & M.* 357. When the plaintiff sues in *forma pauperis*, his attorney is not entitled to be paid anything for his services, whatever be the amount recovered. *Reg. Gen. Hil.* 1853; *Dooly v. Great Northern Railway Company*, 4 E. & B. 341. When he may sue two persons jointly if employed by them, though they were separately interested; *Hellings v. Gregory*, 1 C. & P. 627; *S. C.* 10 Moore, 337. As to an attorney's claim on another attorney, for business done at the request of the latter, for the benefit of a third person; *Scarce v. Whittington*, 2 B. & C. 11. [An attorney is entitled to recover for his professional services, what he reasonably deserves, taking into view the nature of the business performed by him, and his own standing

pal, if the clerk were left without instructions, or the means of conferring constantly with his master. (*p*)

But an attorney who defends an action may recover his costs, although he was in prison for some time during the progress of the cause, provided his client had, during that time, opportunities of communicating with him. (*q*) It would be otherwise, however, in the case of an attorney for the plaintiff, unless he had begun to be attorney in the cause before being committed to prison. (*r*)

An attorney cannot recover by action or suit, for business done by him in that character, unless his certificate was in force during the period within which the work was done. (*s*) But where the client obtained an order in

How affected by want of proper qualification.

in his profession for learning and skill, whereby the value of his services is enhanced to his client. For the purpose of aiding in the determination of this, evidence may be admitted to show the prices usually charged for similar services by other persons of the same profession, in the same vicinity, and practising in the same court. *Vilas v. Downer*, 21 Vt. 419. And in this country all lawyers have generally the same right to recover for their services as attorneys have in England. *Wilson v. Burr*, 25 Wend. 386; *Newman v. Washington*, Martin & Yerg. 79; *Stevens v. Adams*, 23 Wend. 57; *Brady v. Mayor &c.* 1 Sandf. 569; *Vilas v. Downer*, 21 Vt. 419. If an attorney has rendered services for his client without special agreement, he should prove them, and may recover the usual compensation for such services, but he has no right to claim half the amount recovered because the debt was desperate. *Christy v. Douglas*, Wright, 485. Nor can an attorney recover more than he agreed to receive, by proof that his services were worth more. *Coopwood v. Wallace*, 12 Ala. 790. Nor can he recover on the mere proof of services performed; he must also prove his retainer. *Burghart v. Gardner*, 3 Barb. 64. See *Briggs v. Georgia*, 15 Vt. 61; *Brigham v. Foster*, 7 Allen, 420; *Cooper v. Hamilton*, 52 Ill. 119. The plaintiff, an attorney at law, after rendering some services in a suit brought by the defendant, in another state where champerty is prohibited, entered into

a written agreement in Massachusetts, by which he was to receive for all of his services ten per cent. upon the sum recovered. This agreement was held to be void, but the plaintiff was allowed to recover upon a *quantum meruit* for his services up to the time of making the agreement. *Thurston v. Percival*, 1 Pick. 415. See *Redman v. Sanders*, 2 Dana, 70; *Allen v. Hawkes*, 13 Pick. 79; *Rust v. Larue*, 4 Litt. 417; *Caldwell v. Shepherd*, 6 Monroe, 392; *Smith v. Thompson*, 7 B. Mon. 305. A contract made in Ohio between an attorney and his client, in which the latter agrees to pay a certain stipulated sum for the services of the former, dependent upon the contingency of the success of the attorney, is valid; and in case of the attorney's success, the amount stipulated is recoverable at law. *Spencer v. King*, 5 Ham. 183. But if in such case there be a stipulation, that no compromise shall be made without the consent of the attorney, the contract is against public policy and void. *Key v. Vather*, 1 Ohio, 132.]

(*p*) *Hopkinson v. Smith*, 1 Bing. 13. When an attorney's clerk may sue clients for business done at his master's office, the clerk, by agreement with the master, being entitled to that department of business; *Pinley v. Bagnal*, 3 Doug. 155.

(*q*) *Noel v. Hart*, 8 C. & P. 230.

(*r*) *Longmore v. Rogers*, Willes, 288; 12 Geo. 2, c. 13, s. 9.

(*s*) 6 & 7 Vict. c. 73, s. 26; *Duke of Brunswick v. Crowl*, 4 Exch. 492. And

equity for the taxation of his solicitor's bill, with the usual submission to pay what should be found due; it was held that the taxing master was not justified in disallowing certain items, merely because they were incurred between the time of the expiry and that of the renewal of the solicitor's certificate. (*t*) And if the plaintiff was duly qualified as an attorney at the time the work was done, he will be entitled to recover, although he may have ceased to be so at the time of action brought. (*u*)

The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for his fees, where the business in respect of which they are claimed, was done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act. (*v*) And an attorney who is admitted in one of the superior courts may, since that statute, maintain an action for his costs in proceedings carried on in another court, in which he is not admitted, in the name of an attorney of the latter court. (*x*)

“The county courts act, 1846,” (*y*) was held not to prevent an attorney, who had appeared and acted in a cause in one of the courts established by that act, from recovering — in addition to the fee prescribed by the act — his costs for services rendered to his client out of court, in advising upon and getting up the case. (*z*) But the costs, as between attorney and client, for business done in those courts, are now regulated by the 19 & 20 Vict. c. 108, (*a*) and the 30 & 31 Vict. c. 142, s. 15; and, since those statutes, an attorney cannot recover, unless by agreement with his client, (*b*) any costs or charges in respect of such business, other than those allowed under the provisions thereof. (*b*¹)

if he conduct an action in a court without being qualified, he cannot sue for his fees, nor has he a lien for them. *Latham v. Hyde*, 1 C. & M. 128.

(*t*) *Re Jones*, L. Rep. 9 Eq. 63.

(*u*) *Williams v. Jones*, 2 Q. B. 276.

[See *Ames v. Gilman*, 10 Met. 239.]

(*v*) *Richards v. Suffield*, 2 Exch. 616; *Green v. Reece*, 8 C. B. 88; and see *Eyre v. Shelley*, 6 M. & W. 269; *Bowler v. Brown*, 2 A. & E. 116; *Wilton v. Chambers*, 7 A. & E. 524.

(*x*) *Hulls v. Lea*, 10 Q. B. 940.

(*y*) 9 & 10 Vict. c. 95, s. 91.

(*z*) *Keighley v. Goodman*, 9 C. B. 338; *Re Toby*, 12 Q. B. 694.

(*a*) Sects. 33, 35, 36.

(*b*) 33 & 34 Vict. c. 28, s. 4.

(*b*¹) [In the United States, an attorney, who has been regularly admitted to practice in the courts, is presumed to have authority to bring suit in the manner in which he prosecutes; his want of authority must be shown. *Norris v. Douglass*, 2 South. 817. So, he is presumed to have the authority he assumes, to appear and defend in a suit, even in behalf of a corporation. *Osborn v. Bank of United States*, 9 Wheaton, 738; *Proprietors v.*

Right to recover costs for business done in county courts.

2. The law implies a promise on the part of an attorney, that he will conduct the business intrusted to him, with a reasonable degree of care, skill, and dispatch. (*b*²) But the earlier cases did not afford a very satisfactory answer to the question, whether an attorney's negligence or unskilfulness constitute a defence to an action by him for his bill; or whether they merely form matter for a cross-action against him. It seems to be now settled, however, that the negligence or unskilfulness of the attorney do not afford a complete defence to such an action, unless, by reason thereof, the client has obtained and can obtain no benefit whatever from his services; (*c*) and that where some benefit has accrued, or may arise from the exertions of the attorney, — although a part of the advantage which might have been secured is lost by his default or misconduct, — this shall merely go to reduce the amount of his demand. (*d*)

When the attorney's negligence affords a defence to an action by him for his fees.

So an attorney is entitled to recover the amount of his bill, although the proceeding in which he was engaged entirely failed of success, (*d*¹) if such failure occurred partly from accident, and not wholly from his own negligence. (*e*) And where an attorney was instructed to plead in abatement for the purpose of delay, but omitted so to do, Lord Ellenborough held that this was no defence to an action on this bill; (*f*) observing, that the defendant could not complain that such instructions were disobeyed.

Templer v. M'Lachlan (*g*) appears to have been one of the first cases on this subject. That was an action by an attorney, to recover his costs for conducting a suit for

Cases on this subject.

Bishop, 2 Vt. 231. He is not bound to prove his authority until it is disputed. See *Osborn v. Bank of United States*, *ubi supra*; *Noble v. Bank of Kentucky*, 3 Marsh. 263; *Henck v. Todhunter*, 7 Har. & J. 275; *Harding v. Hull*, 5 Har. & J. 478; *Jackson v. Stewart*, 6 John. 34; *Denton v. Noyes*, 6 John. 296; *Huston J. in Lynch v. Commonwealth*, 16 Serg. & R. 369; *Woodbury J. in Eastman v. Coos Bank*, 1 N. H. 23; *Murray v. House*, 11 John. 464.]

(*b*²) [*O'Barr v. Alexander*, 37 Geo. 195.]

(*c*) *Bracey v. Carter*, 12 A. & E. 373; *Huntley v. Bulwer*, 8 Scott, 325. [*Hopping v. Quin*, 12 Wend. 517. An attorney at law, who collects money, and neglects or refuses to pay it over to his client until sued for it, is entitled to no compensation

for his professional services. *Bredin v. Ringland*, 4 Watts, 420. But see *New England Glass Co. v. B. F. Hunt*, United States Circuit Court, Massachusetts, May, 1841.]

(*d*) *Cox v. Leech*, 1 C. B. N. S. 617; *Long v. Orsi*, 18 C. B. 610; 2 Smith L. C. 14.

(*d*¹) [See *Bowman v. Tallman*, 40 How. (N. Y.) R. 1. The retainer of an attorney does not imply an engagement for success, but only that he will use due diligence, care, and skill in the usual course of proceeding. See *Gallagher v. Thompson*, *Wright* (Ohio), 466.]

(*e*) *Dax v. Ward*, 1 Stark. 409; and see *Lewis v. Collard*, 14 C. B. 208.

(*f*) *Johnson v. Alston*, 1 Camp. 176.

(*g*) 2 N. R. 136.

M'Lachlan against one Gardiner. Gardiner was arrested in the original suit, but the attorney, Templer, had carelessly suffered worthless bail to justify. Judgment, however, was obtained in the action against Gardiner; and it was held, that the plaintiff was entitled to recover. Sir James Mansfield C. J. said: "I do not go the length of saying, that in no case of this kind can negligence in the party suing be used as a defence to the action, though I think it can only be so used where the negligence has been such, that the party for whom the work was done has thereby lost *all possibility of benefit* from such work. Now, that cannot be said in the present case, since a judgment has been obtained for the defendant, and its fruits may possibly hereafter be had by him. If the defendant had been *nonsuited* in the action against Gardiner, through the mere negligence of his attorney, or had *wholly lost* the fruit of his proceedings, I should have been very unwilling to allow him to recover the amount of his bill."

So, where an attorney brought an action for business done by him as solicitor to a commission of bankruptcy; and the defence was, that the commission was sued out, in consequence of the plaintiff having advised that it would be operative in the Isle of Man; Lord Ellenborough said: "This does not go to the root of the action. If there has been such a misrepresentation as is complained of, the party may have recourse to a cross-action; but the commission cannot be considered as a *mere nullity*; it operates, at all events, as a voluntary assignment;" and the plaintiff had a verdict. (*h*) And it has been held, — in an action by an attorney to recover from his client the expenses of conducting a reference, — that it is no defence, that the attorney did not require to see the authority of the opposite party's attorney, to sign the submission for such party; although the fact was, that no such authority existed, and thereby the award became of no effect. (*i*)

But in *Montriau v. Jefferys*, (*k*) it was held to be a good defence to an action on an attorney's bill, that the costs were incurred through inadvertency and want of proper caution on the part of the attorney, in omitting to give a notice, and to advise his client that certain sureties, expressly required by an act of parliament, ought to be provided.

So, where a statute — 1 Geo. 4, c. 11, s. 119 — enacted, that no

(*h*) *Passmore v. Birnie*, 2 Stark. 59.

(*k*) R. & M. 317; S. C. 2 C. & P. 113.

(*i*) *Edwards v. Cooper*, 3 C. & P. 277.

suit at law should be proceeded in, further than an arrest on *mesne* process, by any assignee of an insolvent's estate, without the consent of the creditors, and the approbation of one of the commissioners of the insolvent court; it was held — in an action brought by an attorney to recover his bill of costs, incurred in an action at the suit of such an assignee — that it was incumbent on the attorney to prove, that the consent of the creditors, and the approbation of one of the commissioners had been obtained; or, at all events, that he had informed his client that such consent was necessary. (*l*) And where an attorney, who undertook a prosecution on defendant's behalf, and agreed not to charge him any costs except money out of pocket, negligently preferred a defective indictment, and, in consequence thereof, the prosecution failed; it was held, that he could not recover from the defendant even his disbursements. (*m*)

So where the services rendered are utterly worthless, and the work should plainly not have been undertaken, it is not competent to the attorney to recover his costs; although the business was done through inadvertence or inexperience, and not with the design of imposing on the client, or from any other improper motive. (*n*)

But where an attorney gave his client, the plaintiff in an action, the following undertaking: "Should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only;" and the plaintiff had a verdict with damages and costs; but the defendant obtained his discharge under the insolvent debtors' act, and the plaintiff received only a dividend of 7s. in the pound on the amount of his judgment; it was held that the attorney was not, under these circumstances, limited by his undertaking to costs out of pocket only. (*o*)

So, if an *entire item* in an attorney's bill be for work *partly useful*, the jury will be precluded from reducing that item, in an action to recover the amount of the bill; and the client must, in such a case, resort to a cross-action. But *entire items* for *entirely useless* work, may be discarded by the jury. (*p*)

3. Although, however, the absence of that degree of care, skill, and dispatch, which the law requires on the part of the attorney,

(*l*) Allison v. Rayner, 7 B. & C. 441.

(*n*) Hill v. Featherstonhaugh, 7 Bing.

(*m*) Lewis v. Samuel, 8 Q. B. 685; and 569.

see Turner v. Tennant, 10 Jur. 429, note.

(*o*) In re Stretton, 14 M. & W. 806.

(*p*) Shaw v. Arden, 9 Bing. 287.

may not afford a sufficient ground for resisting his claim for costs ; still he is liable to an action by his client, if he be guilty of a default in either of these duties, whereby the client is injured. (*p*¹) And any provision in an agreement,

When liable
for negli-
gence.

(*p*¹) [*Reilly v. Cavanaugh*, 29 Ind. 435. An action lies against an attorney at law, for negligence in transacting the business of his profession. *Stimpson v. Sprague*, 6 Greenl. 470. An attorney who undertakes to collect a debt, is bound to use all process necessary to the object, and if he neglect to do it, he is liable to his client for the injury sustained by him. *Dearborn v. Dearborn*, 15 Mass. 316 ; *Crooker v. Hutchinson*, 1 Vt. 73 ; *Pennington v. Yell*, 6 Eng. 212. Where an attorney disobeys the lawful instructions of his client, and a loss ensues, he is responsible for the loss. *Gilbert v. Williams*, 8 Mass. 51. See *Smith v. Brewster*, 7 Pick. 137, 138 ; *Adams v. Robinson*, 1 Pick. 461, 462 ; *Crook v. Hutchinson*, 1 Vt. 73 ; *Fitch v. Scott*, 3 How. (Miss.) 314 ; *Grayton v. Wilkinson*, 5 Sm. & M. 268 ; *Dorrance v. Hutchinson*, 22 Maine, 357 ; *Cox v. Sullivan*, 7 Geo. 144 ; *Holmes v. Peck*, 1 R. I. 242. So where an attorney undertakes to collect a debt, and by gross negligence puts it into such a situation as to embarrass the creditor in obtaining payment, and to render the debt of less value, — as where the attorney takes the debtor's note for the debt to himself, secured by a mortgage, contrary to the creditor's directions, — he is liable to his employer, in an action on the case, though the debtor always has been, and still is, able to pay the debt. *Wilson v. Coffin*, 2 Cush. 316. In an action against an attorney at law for negligence in making a writ, it appeared that he used a printed form containing the common money counts, with blank spaces for the insertion of sums ; that formerly the word *hundred* was printed in the forms of writs, but was omitted in the recent forms, one of which he made use of, so that by mistake he declared for twelve dollars instead of twelve hundred dollars, the sum due to the plaintiff being \$1,000 ; that property to the value of

\$1,200 was attached on the writ, but in consequence of the mistake the plaintiffs lost the benefit of the attachment, and were unable to obtain payment of their demand, the debtor being insolvent ; and that at the same time when the attorney made the writ for the plaintiffs he made another, with a similar blank form, in which he wrote the word *hundred*. It was held, that this evidence was sufficient to sustain a verdict against the attorney, on the ground of negligence. *Varnum v. Martin*, 15 Pick. 440. See *Oldham v. Sparks*, 28 Texas, 425. An attorney who has collected debts due to his client, is not liable to an action for the money till it has been demanded of him. *Staples v. Staples*, 4 Greenl. 532 ; *Taylor v. Bates*, 5 Cowen, 376 ; *Satterlee v. Frazer*, 2 Sandf. (S. C.) 141. See *Voss v. Bachop*, 5 Kansas, 59. And declarations made by him, that he intended to retain money collected by him for his client, to indemnify him for fraud in the sale of a horse, do not dispense with the necessity of a demand, unless such declarations were made to the agent of the plaintiff, or came to his knowledge before suit brought. *Rathbun v. Ingalls*, 7 Wend. 320 ; *Walradt v. Maynard*, 3 Barb. 584 ; *Krause v. Dorrance*, 10 Barr, 462. Two attorneys are in partnership, one receives money in behalf of the firm, due to their client, of whom the client demands it ; this is a receipt by and a demand of both, who are liable to the client jointly, without any demand upon, or notice to the other. *M'Farland v. Crary*, 8 Cowen, 253. See, further, on this subject, 1 Met. & Perkins's Dig. tit. Attorney and Counsel, § 111. The appearance of an attorney without proof of an authority derived from a defendant, does not, *per se*, invalidate a judgment. If loss be sustained thereby, the attorney must answer in a civil action by the party injured. *Munnikuyson v. Dorsett*, 2 H.

made between an attorney or solicitor and his client under the 33 & 34 Vict. c. 28, that the attorney or solicitor shall not be liable for negligence, is wholly void. (*q*)

But to render him thus liable, there must be *lata culpa* or *crassa negligentia*, — a gross default, negligence, or ignorance. And if the attorney has acted *bonâ fide* to the best of his skill, and with an ordinary degree of diligence, he will not be responsible. (*r*)

Thus, in *Compton v. Chandless*, (*s*) Le Blanc J. observed :

“That an attorney was only bound to use reasonable care and skill in managing the business of his client ; and that if he were liable further, no man would venture to act in that capacity.” So in a subsequent case, (*t*) — where the attorney was sued for negligence in the purchase of an annuity for the plaintiff, — Lord Ellenborough expressed his assent to this doctrine ; and held, that an attorney employed to purchase and prepare the assignment of an annuity, before the decisions holding that the trusts in the annuity deeds must be particularly set forth in the memorial, was not liable for negligence in not having pointed out to his employer, that the annuity purchased was void, because the memorial omitted to specify particularly the trusts of the deeds.

And the law on this subject was very fully stated by the late Lord C. J. Tindal (*u*) as follows: “It would be extremely difficult to define the exact limit, by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause, is bounded ; or to trace precisely the dividing line between that

& Gill, 374. See *Denton v. Noyes*, 6 John. 296 ; *Smith v. Bowditch*, 7 Pick. 137. And he is estopped from denying that he was the party's attorney. *M'Farland v. Crary*, 8 Cowen, 253.]

(*q*) Sect. 7. .

(*r*) *Purves v. Landell*, 12 Cl. & Fin. 91 ; *Russell v. Palmer*, 2 Wils. 325 ; *Pitt v. Yalden*, 4 Burr. 2060 ; *Laidler v. Elliott*, 3 B. & C. 738, 742 ; and see *Chapman v. Chapman*, L. R. 9 Eq. 276 ; [*Swinfen v. Swinfen*, 5 H. & N. 590 ; *Chown v. Parrot*, 14 C. B. N. S. 74 ; *Pennington v. Yell*, 6 Eng. 212 ; *Lynch v. Commonwealth*, 16 Serg. & R. 368 ; *Evans v. Watrous*, 2 Porter, 205 ; *Gallagher v. Thompson*, *Wright* (Ohio), 466 ; *Percy v. Millaudon*, 20 Martin, 68, 75 ; *Varnum v. Martin*, 15 Pick. 440 ; *Wilson v. Coffin*,

2 Cush. 316, 323 ; *Dearborn v. Dearborn*, 15 Mass. 316 ; *Gilbert v. Williams*, 8 Mass. 51 ; *Holman v. King*, 7 Met. 384 ; *Cox v. Sullivan*, 7 Geo. 144 ; *Nesbit v. Lawson*, 1 Kelly, 275 ; *Parker v. Rolls*, 14 C. B. 691 ; *Hosmer C. J. in Brackett v. Norton*, 4 Conn. 524 ; *Fray v. Voules*, 1 El. & El. 839 ; *O'Barr v. Alexander*, 37 Geo. 195 ; *Wilson v. Russ*, 20 Maine, 421 ; *Goodman v. Walker*, 30 Ala. (N. S.) 482 ; *Cox v. Sullivan*, 7 Geo. 144 ; *Gambert v. Hart*, Sup. Ct. Cal. 7 Am. Law Rev. 561, 562.]

(*s*) Cited in *Baikie v. Chandless*, 3 Camp. 19.

(*t*) *Baikie v. Chandless*, 3 Camp. 17.

(*u*) See *Godefroy v. Dalton*, 6 Bing. 460, 467.

reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance there with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." And, accordingly, it has been held, that an attorney is not responsible for the consequences of a mistake in a point of law, upon which a reasonable doubt might be entertained; (*v*) or for a mistake in a nice point of practice, arising on the meaning of an act of parliament, (*x*) or of a rule of court. (*y*)

But where the plaintiff's attorney suffered the case to be called on at the trial, without previously ascertaining whether a material witness (whom the plaintiff had undertaken to bring into court) had arrived, and the plaintiff was nonsuited in consequence; it was held, in an action against the attorney for negligence, that it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict. (*z*) So, if it appear that the attorney in a cause which was about to be tried, delivered a brief to counsel, but that he did not, either by himself or by a competent clerk, attend at the trial, so as to give such information upon the matter as counsel might require; this will support a declaration, charging the attorney with having "neglected to instruct counsel." (*a*) And a jury may find an attorney guilty of negligence, if he omit to notice particular conveyances and deeds, in laying an abstract before a conveyancer; or if, instead of leaving the whole case to counsel, he chooses to draw his own conclu-

(*v*) *Kemp v. Burt*, 4 B. & Ad. 424. See, also, *Bulmer v. Gilman*, 4 M. & G. 108; 4 Scott N. R. 781, 794; *Elkington v. Holland*, 9 M. & W. 659; [*Bowman v. Tallman*, 40 How. (N. Y.) Pr. 1; *Watson v. Muirhead*, 57 Penn. St. 161.]

(*x*) *Chapman v. Van Toll*, 8 E. & B. 896.

(*y*) *Laidler v. Elliott*, 3 B. & C. 738; per Lord Tenterden C. J. *Montrieu v. Jefferys*, R. & M. 320.

(*z*) *Reece v. Rigby*, 4 B. & Ald. 202.

(*a*) *Hawkins v. Harwood*, 4 Exch. 503.

sions, which turn out to be incorrect. (b) So, an attorney will be liable for negligence if he rely on a mere partial extract from a will, produced by the party to whom his client is about to lend money on the security of a legacy given by the will : unless it appear that the client took upon himself the charge and responsibility of examining the will. (c) So, he is responsible if he do not exercise a reasonable discretion, in proceeding to take out execution upon a judgment after a compromise, and the execution is set aside, as being contrary to good faith, and vexatious. (d)

And it would seem that the mere fact of the attorney having acted in the matter complained of, according to the advice of counsel, will not in all cases relieve him from responsibility ; the rule being, that his liability must depend upon the nature and description of the mistake or want of skill with which he is charged ; and that he cannot shift from himself such responsibility, by consulting another where the law would presume him to have the knowledge himself. (e)

Again : if an attorney lose a deed which is intrusted to him, this will be *prima facie* evidence of negligence. (f) So, if he be guilty of a breach of professional confidence, he will be liable for any damage thereby occasioned to his client. (g) So if, through the negligence of the attorney, the client be compelled to pay costs to a third party, he may bring an action against the attorney to recover the sum so paid. (h) And when an attorney is called upon by his client to deliver up papers of which he, the attorney, has charge, he is bound to deliver them in reasonably fit order and condition for use ; and he is liable to an action by the client if he neglect to do so. (i)

But no action can be maintained against an attorney, for negligence in commencing a suit against excise officers for a seizure of goods by them, without giving the previous notice required by law, if it appear that the seizure was lawful ; for in such case no dam-

(b) Ireson v. Pearman, 2 B. & C. 799.

(f) Reeve v. Palmer, 5 C. B. N. S.

(c) Wilson v. Tucker, 3 Stark. 154.

84.

(d) Shaw v. Arden, 9 Bing. 287. See another instance of gross negligence, Frankland v. Cole, 2 C. & J. 590.

(g) Taylor v. Blacklow, 3 Scott, 614.

(e) Per Tindal C. J. Godefroy v. Dalton, 6 Bing. 460, 469. The attorney in a cause is not answerable for the absence or neglect of the counsel engaged in it. Lowry v. Guildford, 5 C. & P. 234.

(h) Meggs v. Binns, 3 Scott, 52. But unless the attorney has been guilty of gross negligence, the court will not order him, on motion, to pay such costs to his client. Ib.

(i) North Western Railway Company v. Sharp, 10 Exch. 451.

age can have resulted to the client from the attorney's neglect. (*k*)

Where, however, an attorney was instructed by his client to defend him against an action for negligent driving, and the attorney suffered judgment to go by default; it was held that he was liable to be sued for not pleading to the action; and that it was not necessary for the plaintiff to prove that he had a defence to such action, but that it was incumbent on the attorney to prove that there was no defence thereto. And the court seemed to think that the plaintiff was not bound to show that special damage had resulted from the attorney's default. (*l*)

And although there is, in general, no privity between a town agent and the client of an attorney in the country, so that the client cannot sue the agent for negligence; (*m*) still, the attorney is liable for the mistakes or negligence of his agent; and may be sued by the client for any damage he may sustain in consequence thereof. (*n*)

4. It was formerly considered, that an attorney who had once undertaken the prosecution or defence of a suit for his client, was bound to continue his services until it was concluded, although the client omitted to furnish the necessary funds. (*o*) But it is now settled, that an attorney is not required to proceed to the end of a suit, in order to be entitled to his costs; but that he may, upon reasonable cause and reasonable notice, abandon the conduct thereof, and recover his costs for the period during which he has been employed. (*p*) Thus, if the client denies his liability to pay the costs

When an attorney is entitled to discontinue to conduct the business of his client.

(*k*) *Aitcheson v. Madock*, Peake, 162; *Lee v. Ayrton*, 1b. 119. [See *Anon.* 1 Wend. 108. To an action brought by A. against B., an attorney at law, for negligence in not instituting a suit against C. to recover a debt due by C. (as alleged) to A., it is a good defence, that the debt was not really owing by C. to A., but to another person at the time when the defendant was retained to institute the suit. *Jackson v. Tilgham*, 1 Miles, 31. See *Folsom v. Mussey*, 1 Fairf. 297.]

(*l*) See *Godefroy v. Jay*, 7 Bing. 413. [But it seems that the attorney will not be liable unless he has been informed by his client, what the nature of the defence, he

was expected to make, is. *Grayson v. Wilkinson*, 5 Sm. & M. 268; *Salisbury v. Gourgas*, 10 Met. 442.]

(*m*) *Robbins v. Fennell*, 11 Q. B. 248; 12 Jur. 157; *Cobb v. Becke*, 6 Q. B. 930, 935.

(*n*) *Collins v. Griffin, Barnes*, 37.

(*o*) 1 Sid. 31; *Mordecai v. Solomon*, Say. 173; *Tidd*, 9th ed. 86.

(*p*) *Harris v. Osbourn*, 2 C. & M. 629; *Whitehead v. Lord*, 7 Exch. 691; *Nicholls v. Wilson*, 11 M. & W. 106; *Vansandau v. Brown*, 9 Bing. 402. What is not reasonable notice of abandonment; *Hoby v. Built*, 3 B. & Ad. 350.

already incurred in the suit, the attorney may at once refuse to proceed further therewith, and bring an action for his costs. (*q*) So where, in an action on an attorney's bill for business done in chancery, it appeared that the plaintiff had given notice, that he would not go on with the suit without being supplied with money, and had actually given up the papers on the master making a report; it was held, that the attorney might recover for the work done up to that time, although the suit was not finally determined. (*r*) So it is held, that an attorney is not bound to proceed with a cause, unless the client, on reasonable notice, make advances to pay costs out of pocket. (*s*) And it has been held, that if an attorney had reasonable ground for commencing an action, and it appears that he desisted only because he afterwards found that the cause could not be sustained, he will be entitled to recover for his work and labor. (*t*)

(*q*) *Hawkes v. Cottrell*, 3 H. & N. 243.

(*r*) *Rowson v. Erle*, M. & M. 538.

(*s*) *Wadsworth v. Marshall*, 2 C. & J. 665. [An attorney is not bound to proceed in a suit, unless his legal fees are tendered or secured to him, if he requests it. *Gleason v. Clark*, 9 Cowen, 578; *Castro v. Bennett*, 2 John. 296. Nor is an attorney bound to take a letter from the post-office charged with postage, though he has reason to believe it contains law papers, and the consequence of his omission is a default. *Bohannon v. Paterson*, 9 Wend. 503.]

(*t*) Per Tindal C. J. *Lawrence v. Potts*, 6 C. & P. 428. [See *Pennington v. Yell*, 6 Eng. 212. A lawyer, who, with his client's consent, withdraws from a case, after having rendered beneficial services, may still recover for his services performed, unless at the time of withdrawing, he waives his claim to compensation. *Coopwood v. Wallace*, 12 Ala. 790. As to the lien of an attorney upon the papers, &c. of a client, see 2 Kent, 640, 641. An attorney's lien on the cause for his fees, does not exist till judgment is entered. *Potter v. Mayo*, 3 Greenl. 34; *Hobson v. Watson*, 34 Maine, 20. See *Martin v. Hawks*, 15 John. 405; *Dunklee v. Locke*, 13 Mass. 525; *Sweet v. Bartlett*, 4 Sandf. 661; *Hutchinson v. Pettes*, 18 Vt. 614. An attorney has no lien upon the damages recovered in a cause, before they come to

his hands, notwithstanding he has a demand against his client equal to the amount of the recovery. *St. John v. Diefendorf*, 12 Wend. 261. He has a lien on his client's papers in his possession, but not upon anything belonging to his client until it is in his possession. *Ib.* And in some states he may hold the papers for a general balance. *Dennett v. Cutts*, 11 N. H. 163; *Walker v. Sargeant*, 14 Vt. 247. But not in Pennsylvania. *Walton v. Dickerson*, 7 Barr. 376. This right to hold for a general balance does not extend to a judgment in a cause. The attorney's lien upon a judgment does not in any way depend upon possession, but rests upon the equity of the attorney's claim to be repaid out of the proceeds of a judgment, for his fees and disbursements, which ordinarily constitute a part of the judgment itself. This right is limited to the fees and disbursements of the attorney in that cause, and cannot be extended to "commissions" or "counsel fees," or other charges, however proper in themselves. *Wright v. Cobleigh*, 21 N. H. 339; *Shapley v. Bellows*, 4 N. H. 347; *Currier v. Boston & Maine Railroad*, 37 N. H. 223; *People v. Hardenburg*, 8 John. 335; *Heart v. Chipman*, 2 Aiken, 162; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Benjamin v. Benjamin*, 17 Conn. 110. When an attorney has become lawfully possessed of an execu-

5. Authors.

There can be no doubt that an author cannot recover any remuneration, for composing for the press a work of an immoral or libellous description. But it is said, that although it would be a good defence to an action for not supplying manuscript to complete such a work according to agreement, that the subject-matter thereof was of an illegal nature; yet, if the work be not produced, the *presumption* shall be that it was lawful. (*u*)

If a person agree to write a treatise for a periodical work, to be published as a part thereof, and the periodical publication be abandoned, the author is discharged from liability to complete his treatise, and may recover upon a *quantum meruit* for his labor, without tendering or delivering the treatise. This was decided in *Planché v. Colburn*, (*x*) where the plaintiff had agreed to write for "The Juvenile Library," a volume upon costume and ancient armor. And Tindal C. J., upon motion to set aside a verdict for the plaintiff, observed: "The considerations by which an author is generally actuated in undertaking to write a work, are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The defendants, by putting an end to 'The Juvenile Library,' broke their contract with the plaintiff."

6. Builders and other Workmen.

A contract to build, alter, or repair a house, or the like, and to provide materials for the purpose, need not, it seems, be in writing, unless it is not to be performed within a year. And the reason of this would appear to be, that such contracts do not fall within the provisions of the statute

When a contract to build, &c., must be in writing.

tion in favor of his client, he may enforce his lien thereon for his fees and disbursements in the cause by action on the judgment in the name of his client. *Woods v. Verry*, 4 Gray, 357. So, where a bond is given for the release of a debtor's body from custody, the lien follows the bond,

and the attorney has a property in the bond to the extent of his lien, and he may use the name of the original party in a suit upon it. *Hobson v. Watson*, 34 Maine, 20.]

(*u*) *Gale v. Leckie*, 2 Stark. 107.

(*x*) 8 Bing. 14.

of frauds, 29 Car. 2, c. 3, s. 17, nor within those of the stat. 9 Geo. 4, c. 14, s. 7,—both of which relate to contracts for the “sale of *goods* ;” — a contract to build, alter, or repair a house, or the like, not being in law a contract for the sale of goods, even as regards the materials ; but being an entire contract for work and materials. (*y*)

In general, the person whom the defendant originally retained is the proper party to sue on a contract of this nature. But where the defendant had in the first instance employed A. to build a machine ; and A., having partly built the machine, assigned it and the contract to B., who completed the work upon the defendant’s orders to go on, and his promise that he would see him paid ; it was held that B. might sue for the price. (*z*)

Who is the proper party to sue thereon.

Where additions are ordered to be, and are made to a building which a workman has contracted to finish for a certain sum, the original contract is held to exist, as far as it can be traced to have been followed ; and the excess must be paid for, according to the usual rate of charging. (*z*¹)

Right to charge for extras.

(*y*) See *Lee v. Griffin*, 1 B. & S. 272 ; *Clay v. Yates*, 1 H. & N. 73 ; [*Hight v. Ripley*, 19 Maine, 139 ; *Cummings v. Dennett*, 26 Maine, 401 ; *Cason v. Cheely*, 6 Geo. 554 ; *Scott v. Eastern R. R. Co.* 12 M. & W. 33.]

(*z*) *Oldfield v. Lowe*, 9 B. & C. 73. [In such case A. could not sue, — the contract being entire, and the interest having passed to B. *Derby v. Sandford*, 9 Cush. 263. See *M’Carty v. Osborne*, 1 Blackf. 325 ; *Tebbetts v. Haskins*, 16 Maine, 283.]

(*z*¹) [*Story Bailm.* (2d ed.) § 441 c ; *Jewett v. Weston*, 2 Fairf. 346 ; *Aiken v. Bloodgood*, 12 Ala. 221 ; *Wright v. Wright*, 1 Litt. 181 ; *Dubois v. Del. & Hud. Canal Co.* 4 Wend. 285 ; *Hayward v. Leonard*, 7 Pick. 181 ; *Wheeden v. Fiske*, 50 N. H. 125, 127 ; *Sedgwick Damages*, 249 ; *Jones v. Woodbury*, 11 B. Mon. 167 ; *Marsh v. Richards*, 29 Missou. 99 ; *De Boom v. Priestly*, 1 Cal. 206 ; *McClelland v. Snider*, 18 Ill. 58. In *M’Cormick v. Connolly*, 2 Bay, 401, it was held, that where a contract is made for any building, of whatever size or dimensions, it becomes a law to the parties, and

they are both bound by it, and whatever additions or alterations are made in such building, they form a new contract, either express or implied, without affecting the original contract, and must be paid for agreeably to such new contract. A party entered into an agreement for the construction of a section of a canal, by which he was to receive a given price per cubic yard for ordinary excavation, and an increased sum per cubic yard for excavation of rock, but no compensation was provided for the excavation of hard-pan ; and, in the progress of the work, a large quantity of that substance was excavated, a fair remuneration for which exceeded the highest price specified in the contract for any species of work, and the parties, whilst the section was constructing, treated the excavation of hard-pan as not embraced in the contract, and after its completion, it was conceded by the company for whom the work was done, that the contractor was entitled to compensation for such work beyond the price fixed for ordinary excavation ; held, that the contractor was entitled to recover for such work upon a *quantum*

But if a man contract to work by a certain plan, and, by consent of the parties, that plan be so entirely abandoned that it is impossible to trace the contract, and to say to which part of the work it shall be applied; in such case the woman shall be permitted to charge by measure and value for the whole work done, as if no such contract had been made. (a)

Where, however, a party has agreed to make an article of certain materials for a stipulated sum, he cannot charge more than that sum, although he use better materials than those agreed upon, provided they were used without authority; nor, where he has delivered the article, can he insist upon its being returned, on the refusal of the other party to pay the advanced price. (b)

And in the case of *Lovelock v. King*, (c) — in which there was a claim for *extra work*, there having been a specific contract for certain work at a fixed price, — Lord Tenterden, in summing up to the jury, said: “A person intending to make alterations of this nature, generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not.” . . . “Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price.

meruit, whatever he could show the work was worth. *Dubois v. Del. & Hud. Canal Co.* 12 Wend. 334.]

(a) Per Lord Kenyon, *Pepper v. Burland*, Peake, 103; *Robson v. Godfrey*, Holt, 236; [*Tebbetts v. Haskins*, 16 Maine, 283; *Wheeden v. Fiske*, 50 N. H. 125; *Addison Contr.* 216. When the original contract has been entirely abandoned, it is no longer a guide for estimating the price of the work done, and materials found. *Tebbetts v. Haskins*, *ubi supra*.] If the original contract be in writing, the plaintiff cannot go into his claim for extras, without producing such written contract, duly stamped. *Buxton v. Cornish*, 12 M. & W. 426.

(b) *Wilmot v. Smith*, 3 C. & P. 453; [*Hort v. Norton*, 1 McCord, 22; *Story Bailm.* (2d ed.) § 441 c. This is upon the principle that labor and service per-

formed voluntarily by one man for another, without the request or privity of the latter, however meritorious or beneficial they may be, as, in removing his property to save it from destruction by fire, affords no cause for an action. *Bartholomew v. Jackson*, 20 John. 28. See *Mumford v. Brown*, 6 Cowen, 475. “If a man voluntarily build a house, or make any other erection upon the land of another, against the will of the owner, although his estate may be rendered more valuable by the erection, we have been referred to no case, which decides that he is under obligation to pay for it; at least until he has manifested an unequivocal act of acceptance.” *Weston C. J. in Knowlton v. Plantation No. 4*, 14 Maine, 25, 26; *Davis v. Bradford*, 24 Maine, 349, 351.]

(c) 1 Moo. & Rob. 60.

But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering, that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed, at the time of the consent, that the effect of the alteration will be to increase the expense of the work." (*c*¹)

And where, by the terms of the contract, *extras* are to be ordered in writing, the party is liable only for such as are so ordered. (*d*)

If there be an agreement that a specific sum of money shall be paid for the performance of any work, the claim may be reduced, by showing that the work or materials (*e*) were of an inferior description and value; (*e*¹) and the demand may be altogether defeated, by showing that the work is totally inadequate to answer the purpose for which it was undertaken. (*f*)

When the amount of the claim may be reduced, because of the badness of the work.

If, however, a bill of exchange has been given for the work, the bad quality or partial insufficiency thereof does not afford any ground for reducing the amount claimed upon such bill. (*g*)

(*c*¹) [See *Miller v. McCaffrey*, 9 Barr, 245.]

(*d*) *Russell v. Da Bandeira*, 13 C. B. N. S. 149.

(*e*) Where the plaintiff has neglected to find some materials which he had engaged to provide, and the defendant has found and paid for them; or where a person is employed to do certain work for a specific sum, and part of the work is afterwards done by the employer, the defendant is entitled to deduct from the damages the value of such work or materials, without pleading a set-off. *Newton v. Forster*, 12 M. & W. 772; *Turner v. Diaper*, 2 M. & G. 241; 2 Scott N. R. 447. But see *Allinson v. Davies*, Peake Add. Ca. 82.

(*e*¹) [*Ligget v. Smith*, 3 Watts, 331; *Hayward v. Leonard*, 7 Pick. 181; *Jewett v. Weston*, 2 Fairf. 346.]

(*f*) *Pardow v. Webb*, Car. & M. 531; 2 Smith L. C. 13, 14; *Chapel v. Hicks*, 2 C. & M. 214; *Street v. Blay*, 2 B. & Ad. 456; *Allen v. Cameron*, 1 C. & M. 832; *Farnsworth v. Garrard*, 1 Camp. 38. See *Fisher v. Samuda*, Ib. 191; *Denew v. Dayerell*, 3 Ib. 451; *Okell v. Smith*, 1

Stark. 108. [If the work has been so improperly and unskilfully done, that it is of no use, benefit, or value to the employer, or does not in any manner whatsoever answer the intended purpose, no compensation whatsoever is recoverable. *Taft v. Montague*, 14 Mass. 282; *Linningdale v. Livingston*, 10 John. 36; *Story Bailm.* (2d ed.) 441 b; *Hill v. Millburn*, 17 Maine, 316; *Teagan v. Meredith*, 4 Missou. 415; *S. P. Helm v. Wilson*, 4 Missou. 41; *Goslin v. Hodson*, 24 Vt. 140; *Tindal C. J.* in *Cutler v. Close*, 5 C. & P. 337; *Miller v. Phillips*, 31 Penn. St. 218; *Cole v. Clark*, 3 Wisc. 323. But where the work fails after completion by any means not within the control of the workman or contractor, this will not defeat a recovery for the price stipulated to be paid. *Hunt v. Toulmin*, 1 Stew. & Port. 178.]

(*g*) *Farnsworth v. Garrard*, 1 Camp. 38, 40, note; *Tye v. Gwynne*, 2 Ib. 346; *Moggridge v. Jones*, 3 Ib. 38; *S. C.* 14 East, 486. See *Archer v. Bamford*, 3 Stark. 175; *Obbard v. Betham*, Moo. & M. 483; *Spiller v. Westlake*, 2 B. & Ad. 155;

“If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement. (h) But if he prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*; for otherwise, he would not be able to recover at all.” (i)

[Hoar v. Clute, 15 John. 224; Thorpe v. White, 13 John. 53.]

(h) See Rees v. Lines, 8 C. & P. 126; 2 Smith L. C. 11; [Morton J. in Olmstead v. Beale, 19 Pick. 528.]

(i) Bull. N. P. 139, cited by Sir James Mansfield in Cooke v. Munstone, 1 New R. 355. See Ellis v. Hamlyn, 3 Taunt. 52; 2 Smith L. C. 13, 14; Lucas v. Godwin, 4 Scott, 502; [Hayward v. Leonard, 7 Pick. 181. In this case the plaintiff contracted in writing to build a house for the defendant, by a certain time, in certain dimensions, and in a certain manner, on the defendant's land, and afterwards built the house within the time, of the dimensions agreed on, but in workmanship and materials varying from the contract. The defendant was present almost every day during the building, and had an opportunity of seeing all the materials and labor, and objected at times to parts of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with parts of the work from time to time, though professing to be no judge of it. Soon after the work was done he refused to accept it, but the plaintiff had no knowledge that he intended to refuse it until after it was finished. It was decided that the plaintiff might sustain an action against the defendant on a *quantum meruit* for his labor, and on a *quantum valebant* for the materials. Parker C. J. said: “The point in controversy seems to be this: whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the ma-

terials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented, — there having been no prohibition to proceed in the work after a deviation from the contract has taken place, — no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed if the builder could recover nothing. And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value; for he may have contracted to build at an underprice, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make

And the measure of damages in such a case, is the stipulated price, less the sum which it would take to complete the work according to the agreement. (*k*)

the price good, deducting the loss or damage occasioned by the variation from the contract." After noticing and stating *Faxon v. Mansfield*, 2 Mass. 147; *Taft v. Montague*, 14 Mass. 282, and *Stark v. Parker*, 2 Pick. 267, the learned chief justice proceeded: "These are very different from cases like the present, where the contract is performed, but, without intention, some of the particulars of the contract are deviated from. It is laid down as a general position in Buller's *Nisi Prius*, 139, that if a man declare upon a special contract, and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Mr. Dane (vol. i. p. 223) disputes this doctrine, and thinks it cannot be law unless the imperfect work be accepted. Buller makes no such qualification, and yet it would seem to be reasonable that if the thing contracted for was a chattel, the party for whom it was made ought not to be held to take it and pay for it, unless it is made according to the contract, as a ship, a carriage, &c.; and this principle seems to be of common use in regard to articles of common dealing, such as wear-

ing apparel, tools, and implements of trade, ornamental articles, furniture, &c. *McCarren v. McNulty*, 7 Gray, 139; *Walker v. Orange*, 16 Gray, 195. There seems to be, however, ground for distinction in the case of buildings erected upon the soil of another, for in such case the owner of the land necessarily becomes owner of the building. The builder has no right to take down the building, or remove the materials; and though the owner may at first refuse to occupy, he or his heirs or assignees will eventually enjoy the property. And in such cases the doctrine of Buller is certainly not unreasonable. The case put by Buller to illustrate his position, is that of a house built on contract, but not according to it. Mr. Dane's reasoning is very strong in the place above cited, and subsequently in vol. ii. p. 45, to show that the position of Buller, in an unlimited sense, cannot be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express

(*k*) *Thornton v. Place*, 1 Moo. & Rob. 218; [*Veazie v. Hosmer*, 11 Gray, 396; *Gleason v. Smith*, 9 Cush. 484; *Snow v. Ware*, 13 Met. 42; *Hayward v. Leonard*, 7 Pick. 181; *Farmer v. Francis*, 12 Ired. 282; *Morrow v. Huntoon*, 25 Vt. 9; *Crookshank v. Mallory*, 2 Green (Iowa), 257; *Ladue v. Seymour*, 24 Wend. 60; *Rogers v. Humphrey*, 39 Maine, 382; *Blood v. Enos*, 12 Vt. 625; *Gilman v. Hall*, 11 Vt. 510. In *White v. Oliver*, 36 Maine, 92, the jury had been instructed, that there should be deducted from the contract price as much as it would cost to complete the work, according to the agreement, but upon reconsideration, it was thought that

this rule might operate unjustly upon the workman, after he had furnished the labor and materials, and the employer was enjoying the benefit of them. "To make the house such," Howard J. observed, "might cost more than the original contract price, and thus the defendant might receive the labor and materials of great value, without making any compensation. Having accepted the materials and services, the defendant cannot require the plaintiff to reconstruct the house, so as to make it conform to the specifications in the contract, nor by a deduction from the contract price, to furnish the means for that purpose."]

So, if there be a special agreement to do certain work, and the person for whom it is to be done refuses to perform, or renders him-

or implied, by the party with whom he contracted. When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence, may be exceptions." The same view of the law was maintained in *Norris v. Winsor*, 3 Fairf. 293; *Smith v. Lowell*, 8 Pick. 178; *Walker v. Orange*, 16 Gray, 193; *Veazie v. Hosmer*, 11 Gray, 396; *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665; *Hollingshead v. Mastier*, 13 Wend. 276; *Gazzam v. Kirby*, 8 Porter, 253; *Morton J. in Van Deusen v. Blum*, 18 Pick. 231; *Gilman v. Hall*, 11 Vt. 510; *Lomax v. Bailey*, 7 Blackf. 599; *Wade v. Haycock*, 25 Penn. St. 382; *White v. Oliver*, 36 Maine, 92; *Bassett v. Sanborn*, 9 Cush. 58, 63; *Jewett v. Weston*, 2 Fairf. 349; *Jewell v. Schroepel*, 4 Cowen, 564; *Ladue v. Seymour*, 24 Wend. 60; *Kettle v. Harvey*, 21 Vt. 301; *Morrow v. Huntoon*, 25 Vt. 9; *Hayden v. Madison*, 7 Greenl. 76. In this last case, Mellen C. J. said: "A waiver of objections to a non-compliance with the terms of a special contract 'may be either express or implied from circumstances; as if A. contract to build a house for B. of a certain description, and complete it within a certain time for a specified sum, but should fail in complying with the terms of the contract; still if B. should take possession of the house, or in any way accept it, and avail himself of A.'s labor and expense in building it, he may recover a reasonable compensation for his labor and expenses.'" This "reasonable compensation" must be subject to the assumption that the contract price is the true value of the whole services agreed to be performed. See *Newman v. McGregor*, 5 Ham. (Ohio) 351; *Wadleigh v. Sutton*, 6 N. H. 15. In *Snow v. Ware*, 13 Met. 42, *Wilde J.* said: "We are satisfied

that the doctrine laid down in *Hayward v. Leonard*, *ubi supra*, is correct, — we adhere to that decision, which is conformable to manifest justice, and is supported by the modern authorities." "This rule is applicable to those cases in which the labor has been performed in good faith, and not to those where the party has intentionally, and without necessity or sufficient reason, failed to comply with the terms of his contract." *Veazie v. Hosmer*, 11 Gray, 396; *Reed v. Scituate*, 5 Allen, 120, 123. In *Olmstead v. Beale*, 19 Pick. 582, Mr. Justice Morton, remarking upon the rule which prevails in cases of entire contracts for labor abandoned without just cause by the laborer, observed, that "the cases of *Hayward v. Leonard*, and *Smith v. Lowell*, *ubi supra*, are neither incompatible with, nor exceptions to the rule. It will be found in these and other similar cases, that there was an express or implied assent to the deviations from the contract, or a substantial performance of it. The equitable principle which governs them, and which itself is of recent introduction, only extends to unimportant accidental and unintentional deviations, which, from the differences of opinion that so often exist in relation to the exact requisitions in the details of a special contract, had become indispensable to the administration of justice in such cases. But where there is an important and voluntary deviation or omission from the contract, the doctrine of *Faxon v. Mansfield* will apply, and the contractor can have no remedy for the materials furnished and the services performed." See *Smith v. Gugerty*, 4 Barb. 614; *Draper v. Randolph*, 4 Harr. 454; *Forkner v. Pearl*, 1 Smith, 275; *Lee v. Ashbrook*, 14 Miss. 378; *Smith v. Scott's Ridge School Dist.* 20 Conn. 312; *Story Bailm.* (2d ed.) § 441 b; *Newman v. McGregor*, 5 Ham. (Ohio) 351; *Preston v. Tinney*, 2 Watts & S. 53; *Adams v. Hill*, 16 Maine, 215; *Wells J. in Miller v. Goddard*, 34 Maine, 106; *Pullman v. Corning*, 5 Selden, 93; *Veazie v. Hosmer*, 11 Gray,

self incapable of performing his part of the agreement; the other party may either sue for a breach of the agreement, or rescind the

396. There can be no recovery for labor under a contract, when not rendered in conformity to it, unless there has been some acceptance of it, or unless an exact performance has been waived, or unless the non-conformity has been caused by the act of the employer. *Andrews v. Portland*, 35 Maine, 475. An exact performance of the contract is not waived by a payment of part of the contract price, if such payment is made in ignorance of the insufficiency in the work. *Andrews v. Portland*, *ubi supra*. Nor will a waiver of defects in the earlier stages of work done in the construction of a building by contract entitle the contractor to recover, if the subsequent parts of the work have not been done according to contract, or have not been accepted. *Hill v. Millburn*, 17 Maine, 316. Where work was done on a canal boat, and materials found of a kind inferior to those contracted for by the employer, the fact that the employer lived at the same place with the party employed, and saw the work in progress, was held not to raise the presumption that the employer agreed to the alteration. *Young v. White*, 5 Watts, 460. But see *Norris v. Windsor*, 3 Fairf. 293, where an acquiescence in deviations from a contract was held inferable from the fact, that the work was done under the eyes of the employer without objection. In *Hill v. Millburn*, 17 Maine, 316, the plaintiff had entered into a written contract to build a school-house in a particular manner, and by a specified time, upon land of the defendants; but the school-house was not built according to the contract, and was not accepted, or unreasonably refused acceptance by the defendants, and they derived no benefit from it. "Upon such a state of facts," Shepley J. observed, "it would be difficult to perceive upon what principles of law or justice the defendants should be required to make up to the plaintiff any portion of the loss occasioned by his own negligence or misconduct. There can be no just ground upon which the defendants can be

called upon to pay, unless it be their duty to take the building or materials and make the best use or disposition of them in their power and account to the plaintiff. It should at least be shown before they can be required to do this, that they have refused to permit the plaintiff to remove them. The parties having agreed, in the contract, that the building might be erected on the defendant's lands, it was not placed there by wrong, and it could not for that reason become their property. It is said, that where a building is placed upon the land of another, it becomes his property unless the party building, on account of the relation in which the parties stand toward each other, such as landlord and tenant and the like, be entitled to remove it. But where such relation does not exist, if it be put on by consent, the mere fact of placing it there does not transfer the property; some other act must take place to have that effect. It is true that while a building is being constructed for another, under a contract, it must be regarded as so far attached to the freehold, that it cannot be removed until the owner of the land, by refusing to accept it, disclaims the ownership, because the design is that it should be built for his use; and it is to be his upon condition that he does not reject it on the ground that it has not been built according to agreement. But when he does so reject it, his conditional title is terminated, especially when he has also directed it to be removed." The same rules apply to deviations from the contract in reference to the *time* of its completion. If the employer has waived any objection on this ground, or has accepted the work and reduced it to use, the workman will be entitled to recover for his services, making to the employer all due deductions and allowances for any damage or loss occasioned by the delay. *Story Bailm. § 441 b*; *Jewell v. Schroepfel*, 4 Cowen, 564; *Wilde J. in Snow v. Ware*, 13 Met. 42, 50; *Hill v. Millburn*, 17 Maine, 316; *Roberts v. Marston*, 20 Maine, 275; *Adams v. Hill*,

agreement, and sue on a *quantum meruit* for the work actually done. (1)

16 Maine, 215; *Bassett v. Sanborn*, 9 Cush. 58. In a case where the plaintiff agreed under seal to build a house for the defendant, but the work not being completed at the stipulated time, the defendant directed the plaintiff to discontinue, and the contract was not completed, it was held that the plaintiff might still recover upon the common counts for work and labor, &c., deducting all damages to the defendant from the failure of the plaintiff to comply with the contract. *Bassett v. Sanborn*, 9 Cush. 58. It appeared in this case that the plaintiff was proceeding with all reasonable dispatch in the prosecution of the work, and the same was rapidly approaching to its completion. The case was free from all objections of voluntary or wilful abandonment of the work, or designed neglect to conform to the terms of the special contract. See *Kirkland v. Oates*, 25 Ala. 465. But in *Hill v. Millburn*, *ubi supra*, it was held, that in an action at law, when the question is, whether a party has performed a contract requiring performance to be made by a fixed day, the court cannot say that the time of performance is immaterial. See *Raymond v. Bearnard*, 12 John. 274; *Champlin v. Butler*, 18 John. 169; *Clark v. Smith*, 14 John. 326; *Miller v. Phillips*, 31 Penn. St. 218. Where a party contracts to do the carpenters' work on a building within a specified time, it is the duty of the employer to keep the masons' work in such a state of forwardness as to enable the contractor to perform his contract in the time specified, though the contract contains no stipulation to that effect. See *v. Partridge*, 2 Duer (N. Y.), 463; *Shaw C. J. in Cadwell v. Blake*, 6 Gray, 409. Where the subject of the contract has been wholly finished, but there has been some small departure from the contract, in some of the details, the rule of damages must be to deduct so much from the contract price as the work was worth less to the owner. *Gleason v. Smith*, 9 Cush. 486, 487, per Dewey J.]

(1) *De Benardy v. Harding*, 8 Exch. 822; [*Cutter v. Powell*, 2 Smith Lead. Cas. 1, 18; *Pedan v. Hopkins*, 13 Serg. & R. 45, 47; *Bassett v. Sanborn*, 9 Cush. 58; *Planche v. Colburn*, 8 Bing 14; *Goodman v. Pocock*, 15 Q. B. 576; *Hall v. Rupley*, 10 Barr, 231; *Moulton v. Trask*, 9 Met. 577; *Hoagland v. Moore*, 2 Blackf. 167; *Derby v. Johnson*, 21 Vt. 17. A mason, who had contracted to do work for another in the building of a house, at stipulated prices, the owner to furnish the necessary materials, quit the job after having done part of the work, in consequence of the neglect of the owner to furnish materials in season; held, in an action for work done, that the plaintiff was confined to the contract prices, and could not give evidence of the value of the work, other circumstances not appearing. *Coon v. Greenman*, 7 Wend. 121. Where, however, one party was prevented from performance within a stipulated time by the omission of the other, and subsequently performed the work agreed upon, but at an enhanced expense; held that he was not obliged to bring his action upon the contract, but might resort to the *quantum meruit* to obtain his indemnity. *Dubois v. Del. & Hud. Canal Co.* 4 Wend. 285. See *Thayer v. Wadsworth*, 19 Pick. 349; *Shaw v. Lewiston Turnp. Co.* 3 Penn. 445; See *v. Partridge*, 2 Duer (N. Y.), 463; *Merrill v. Ithaca & Oswego R. R. Co.* 16 Wend. 586. If the party who is to pay for work and labor, in pursuance of a special contract, be delinquent in the advancement of funds, the other party may take advantage of the omission by declaring the contract at an end; but if he treats the contract as still subsisting, he thereby waives the consequences of such default, and cannot afterwards allege the rescission of the contract by the defendant, and recover a *quantum meruit*. *Shaw v. Lewiston Turnp. Co.* 3 Penn. 445.]

So, where a lessor contracted to pay his tenant, at a valuation, for certain erections pursuant to a plan to be agreed on, provided they were completed in two months; and no plan was agreed on; but, after the condition broken, the lessor encouraged the lessee to proceed with the work: it was held that the lessee might recover, as for work and labor, on an implied promise arising out of so many of the facts as were applicable to the new agreement. (*m*)

Where, however, in an action for work done and materials provided in repairing a chandelier, it appeared that there was an *express* contract that the plaintiff should make them *perfect* for 10*l.*; but that he had repaired them in *part* only, and had delivered them in an *imperfect* state, so that the benefit derived was worth but 5*l.*; the court held, that the plaintiff could not recover any remuneration, on the ground that the contract was *entire*, and that the plaintiff had not performed it on his part, or been discharged from his obligation to perform it. (*n*)

But if there be nothing in the case amounting to a contract to complete the work before any remuneration shall be due, — as in the case of a shipwright undertaking, in the same way that shipwrights ordinarily do, to put a vessel in repair, — the workman may, after he has proceeded with a portion of the work, refuse to continue it unless he is paid for the work he has performed; and he may recover to that extent. (*o*)

(*m*) *Burn v. Miller*, 4 Taunt. 745. [See *Story Bailm.* § 441 *b*; *Jewell v. Schroepel*, 4 Cowen, 564; *Wilde J. in Snow v. Ware*, 13 Met. 42, 50; *Adams v. Hill*, 16 Maine, 215; *Bassett v. Sanborn*, 9 Cush. 58; *Kirkland v. Bates*, 25 Ala. 465; *Casady v. Clark*, 2 Eng. 123. And so, in all cases where the work has, with the express assent or the acquiescence of the employer, been left incomplete, or the latter has knowingly dispensed with a perfect and skilful performance of it, in like manner a full compensation can be recovered of the employer. *Story Bailm.* § 441 *c*; *Linningdale v. Livingston*, 10 John. 36; *Dubois v. Del. & Hud. Canal Co.* 4 Wend. 285; *Hollingshead v. Mactier*, 13 Wend. 276; *Derby v. Johnson*, 21 Vt. 17.]

(*n*) *Sinclair v. Bowles*, 9 B. & C. 92. See *Parmeter v. Burrell*, 3 C. & P. 144;

[*McCarren v. McNulty*, 7 Gray, 139. If there be a special contract, and it still remains open and unexecuted by the misconduct or fault of the workman, he can recover nothing for his work and labor, and materials employed in part fulfilment of the contract. *Story Bailm.* (2d ed.) 441 *b*; *Cobb v. West*, 4 Duer (N. Y.), 38; *Clark v. Smith*, 14 John. 326; *Rees v. Lines*, 8 C. & P. 126; *Faxon v. Mansfield*, 2 Mass. 147; *Hill v. Millburn*, 17 Maine, 316; *Kettle v. Harvey*, 21 Vt. 301; *Young v. White*, 5 Watts, 460; *Morton J. in Olmstead v. Beale*, 19 Pick. 528; *Winstead v. Reid*, *Busbee Law* (N. C.), 76; *Wade v. Haycock*, 25 Penn. St. 383, per *Knox J.*; *Brown v. Vinal*, 3 Met. 533; *St. Albans Steamboat Co. v. Wilkins*, 8 Vt. 54; *Jenkins v. Camp*, 13 John. 94; *Pierce v. Schenk*, 3 Hill (N. Y.), 28.]

(*o*) *Roberts v. Havelock*, 3 B. & Ad.

So, where the plaintiff was employed to repair a ship which belonged to, and was then lying in a dock hired for the purpose by the defendant; and, before the repairs were completed, the ship was accidentally burnt; it was held that the plaintiff was entitled to recover to the extent of the work actually done. (*p*) But it would be otherwise if, by the terms of the contract, or by the uniform custom of the particular trade, pay-

404. [See *Cutter v. Powell*, 2 Smith Lead. Cas. 1, 12.]

(*p*) *Menetone v. Athawes*, 3 Burr. 1592; [Story Bailm. §§ 426, 426 a, 426 b, 427. A workman, who had contracted to repair a house and out-buildings for a certain sum, had nearly completed the repairs on the house according to his contract, and the owner had entered and occupied it, when the house and the out-buildings were destroyed by fire. It was held, that the workman was excused from the completion of his contract, and was entitled to recover for the repairs done on the house when the owner took possession, in an action for work done and materials furnished. *Lord v. Wheeler*, 1 Gray, 282. This case was distinguished from the ordinary contract of one to erect a building upon the land of another, the contractor to perform the labor and supply the materials therefor; in which case, if, before the building is completed or accepted, it is destroyed by fire or other casualty, the loss must fall on the builder. He must rebuild. *Adams v. Nichols*, 12 Pick. 275. There is no diversity of principle in these decisions. The man, who engages another by an entire agreement to make repairs upon his buildings, or to build a house upon his land, impliedly engages, at the same time, that he will supply the subject-matter, on which the repairs are to be made, in the one case, and on which the house is to be erected, in the other. If any casualty occurs, by which the materials used in the progress of the work, and the results of the labor of the workman are destroyed, while the subject-matter to which they were to be applied remains entire, he must bear the loss. But if, in the case of the repairs, the buildings are destroyed by

fire or otherwise, so that the subject-matter can no longer be supplied by the employer, to be repaired, the workman is absolved from his contract, and the employer must bear the loss. The latter has failed to fulfil his side of the contract. So, in the other case, if in the progress of the work, of erecting a house on the land of another, the house is destroyed by fire or any other casualty, the builder must suffer the loss. But if the land is levied upon and taken for a debt of the employer, or is taken from him by a superior title, or under the right of eminent domain, or is swallowed up by an earthquake, so that the builder can no longer proceed with the erection of the house, he is absolved from his contract, and the employer must bear the loss, because he fails to perform his undertaking to furnish the land for the erection of the house. The case of *Lord v. Wheeler*, *supra*, stands upon this principle. It cannot be supported on the ground that the repairs had been completed; because the fact was otherwise; nor upon the ground that the owner had accepted them by occupying the house on which they had been made, because his occupation was with a wholly different intent and purpose, so far as anything appears in the case, or is found by the jury. The same rule must have been applied if the owner had remained in the house during the whole time the workman was making the repairs. But the decision is fully supported, on the ground that the completion of the work by the workman was prevented by the failure of the employer to supply the subject-matter, to wit, the building on which the workman might make and complete the repairs contracted for.]

ment was not to be made until the work was completed and delivered. (*q*)

So, where the tenant of a house contracted with the builder, to rebuild a wall without reference to the party-wall act; (*r*) it was held that the latter was entitled to be paid by the former, without observing the requisites prescribed by the act for obtaining payment. (*s*) But a contract for the erection of a building, in contravention of the metropolitan building act, (*t*) cannot be enforced. (*u*)

If a railway company agree to pay a certain price for work, which is to be done to the satisfaction of their engineer; (*v*) or if a building agreement contain the usual clause, that the party will pay upon receiving an architect's certificate that the work has been done to his satisfaction, — the fact of the work having been done to the satisfaction of the engineer in the one case, and the obtaining a proper certificate in the other, is a condition precedent to the right to receive payment. (*x*) And it has been held, that the architect's

(*q*) *Appleby v. Meyers* (in *Cam. Scac.*), *L. Rep.* 2 C. P. 651, reversing the judgment of the court of C. P. in *S. C. L. R.* 1 C. P. 615; *Gillett v. Mawman*, 1 *Taunt.* 137; and see *Adlard v. Booth*, 7 C. & P. 108. [Where a builder has entered into an entire and absolute engagement to erect a building upon the land of another, and in the progress of the work the building is destroyed by fire, the loss falls upon the builder, and he can recover nothing for the materials found or labor bestowed. *Adams v. Nichols*, 19 *Pick.* 275; *School District No. 1 v. Dauchy*, 25 *Conn.* 530. See *Brumley v. Smith*, 3 *Ala. (N. S.)* 123; *Story Bailm.* § 426 b; *Lord v. Wheeler*, 1 *Gray*, 282. So, wherever there is an entire contract for a particular work at a stipulated price, and a casualty occurs, increasing the labor, and cost of constructing the same, the loss must fall upon him who engages to do the work. *Boyle v. Agawam Canal Co.* 22 *Pick.* 381. See *Clark v. Franklin*, 7 *Leigh*, 1; *Wilson v. Knott*, 3 *Humph.* 473.]

(*r*) 14 *Geo.* 3, c. 78.

(*s*) *Stuart v. Smith*, 7 *Taunt.* 158.

(*t*) 18 & 19 *Vict. c.* 122.

(*u*) *Stevens v. Gourley*, 7 C. B. N. S. 99.

(*v*) *Parkes v. Great Western Railway*

Company, 3 *Railw. Cas.* 17. [See *McCarren v. McNulty*, 7 *Gray*, 139.]

(*x*) See *Milner v. Field*, 5 *Exch.* 589. There is not any implied agreement in such a case, by the party for whom the work was done, to procure the required certificate. *Smith v. The Mayor &c. of Harwich*, 2 C. B. N. S. 651. Nor, when buildings are erected on a man's own land, under an agreement to pay for the same on receiving the architect's certificate, will the mere fact of his taking possession of the building be evidence of his having waived the condition as to the certificate; *Munro v. Butt*, 8 E. & B. 738. But equity would relieve in such a case, if it were shown that the certificate was withheld by collusion between the architect or engineer, and the party for whom the work was done. *M'Intosh v. Great Western Railway Co.* 18 *L. J. C.* 94; 19 *Ib.* 374; *Scott v. The Corporation of Liverpool*, 27 *L. J. C.* 641. And in such a case he would also be liable at law; *Batterbury v. Vyse*, 2 H. & C. 42; *Clarke v. Watson*, 18 C. B. N. S. 278. [The decision of engineers or architect, in such cases, is binding on the contractor in all cases where they can freely exercise their own judgments. *Vanderwerker v. Vermont Central R. R. Co.* 27 *Vt.* 130. See *Culbertson v. Ellis*, 6

merely checking the builder's charges, and sending them to the party who employed the builder, is not a sufficient certificate to entitle the latter to sue; although no objection be made to his claim, on this ground, until the trial. (*y*)

The registered owner of a ship is not liable for repairs done thereto, unless they were done upon his credit; and, although the fact of ownership may afford *prima facie* evidence of his liability for necessary repairs; still this presumption may be rebutted, by proof of other circumstances showing that, in fact, no credit was given to, or contract made with him. (*z*)

Where A. was employed by B., to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, of which B. was the patentee: it was held, that A. might recover compensation for the labor and skill, and also for the value of the materials employed by him in the course of the work, under a count for work, labor, and materials. (*a*) But a plaintiff cannot recover for materials, on the count for work and labor. (*b*) Nor can a person who contracts to build a house, or to erect any other fixture, and who furnishes both materials and labor, recover for the materials on the count for goods sold and delivered; although, by reason of a deviation from the original plan, the contract was superseded as to price. (*c*)

7. Counsel.

The employment of a barrister is presumed to be entirely *honorary*, and therefore he cannot maintain an action for his fees. (*d*)

McLean, 248; Lauman *v.* Young, 31 Penn. St. R. 306; Herrick *v.* Belknap's Estate, 27 Vt. 673; Barker *v.* Belknap's Estate, 27 Vt. 700; Messner *v.* Lancaster Co. 23 Penn. St. 291; Bell J. in Smith *v.* Boston &c. R. R. 36 N. H. 491 *et seq.*]

(*y*) Morgan *v.* Birnie, 9 Bing. 672.

(*z*) See Mitcheson *v.* Oliver, 5 E. & B. 419; Mackenzie *v.* Pooley, 11 Exch. 638; Myers *v.* Willis, 17 C. B. 77; Brodie *v.* Howard, Ib. 109; Reeve *v.* Davis, 1 A. & E. 312; [Abbott on Shipp. (ed. 1850) 34-58, 94, and notes; 3 Kent, 113-139; Colson *v.* Bonzey, 6 Greenl. 474; Thompson *v.* Snow, 4 Greenl. 264; Emery *v.* Hersey, 4 Greenl. 507; Winsor *v.* Cutts, 7 Greenl. 261; Higgins *v.* Packard, 2 Hall,

226; Birkbeck *v.* Tucker, 2 Hall, 121; Ring *v.* Franklin, 2 Hall, 1; Ingersoll *v.* Van Bokkelin, 7 Cowen, 670; Thompson *v.* Hamilton, 12 Pick. 425; Cutler *v.* Winsor, 6 Pick. 335.]

(*a*) Grafton *v.* Armitage, 2 C. B. 336; and see Lee *v.* Griffin, 1 B. & S. 272; Clay *v.* Yates, 1 H. & N. 73.

(*b*) Heath *v.* Freeland, 1 M. & W. 543.

(*c*) Clark *v.* Bulmer, 11 M. & W. 243, 250; Tripp *v.* Armitage, 4 M. & W. 687, 693; Cotterell *v.* Apsey, 6 Taunt. 322.

(*d*) 3 Bl. Com. 28; 2 Atk. 332; per Cur. Poucher *v.* Norman, 3 B. & C. 744, 745. [As a general rule in the American states, all lawyers and members of the bar are entitled to recover payment for

And a promise to pay money to counsel for his advocacy, whether made before, or during, or after the litigation, is not binding. (*e*) Nor can a barrister be sued for the recovery of a fee, paid to him with a brief to attend at a trial in his professional character, although he neglected to attend; (*f*) or for unskilfulness or negligence in drawing or settling a bill in chancery, or a declaration or other proceeding in a court of common law. (*g*)

But a certificated conveyancer (*h*) or special pleader, not at the bar, may maintain an action to recover compensation for his professional services.

And where an action was brought by a barrister, for services rendered by him as returning officer on an election of guardians for a union, and an *express* contract was proved for remuneration at so much per day, he was held entitled to recover. (*i*)

8. Physicians.

Before the passing of the 21 & 22 Vict. c. 90, a physician, or medical practitioner who affected to be a physician, had no remedy at law to recover his fees, (*k*) the presumption being that he acted only with a view to an honorary reward. (*l*) And a physician who prepared or dispensed his own medicines, could not recover for them although they were furnished to his own patients. (*m*)

But a physician was entitled to recover, where he could prove

their services in the same manner as other persons. See *Newman v. Washington*, *Martin & Yerg.* 79; *Wilson v. Burr*, 25 *Wend.* 386; *Stevens v. Adams*, 23 *Wend.* 57; *Brady v. Mayor &c.* 1 *Sandf.* 569; *Vilas v. Downer*, 21 *Vt.* 419; *Webb v. Browning*, 14 *Missou.* 353; *Gray v. Brackenridge*, 2 *Penn.* 75; *Calvert v. Cox*, 1 *Gill*, 95. It is the general regulation throughout the United States to combine the two capacities of counsel and attorney. See 2 *Greenl. Ev.* § 144, note (4); *Heart v. Chipman*, 2 *Aik.* 162.]

(*e*) *Kennedy v. Broun*, 13 *C. B. N. S.* 677.

(*f*) *Turner v. Phillips, Peake*, 122.

(*g*) *Fell v. Brown, Peake*, 96; and see *Swinfen v. Lord Chelmsford*, 5 *H. & N.* 890. An action does not lie against a barrister for words spoken by him in the course of his speech, and which were per-

tinent to the matter at issue. *Hodgson v. Scarlett*, 1 *B. & Ald.* 232; per *Holroyd J.* *Flint v. Pike*, 4 *B. & C.* 473, 481.

(*h*) *Poucher v. Norman*, 3 *B. & C.* 744. In *Crammond v. Crouch*, 3 *C. & P.* 77, it was decided by Lord Tenterden C. J. that if a certificated conveyancer assume the character of attorney (he not being one), and obtain employment by such false assumption, and charge as an attorney, he cannot recover any remuneration; not even for moneys paid by him in the course of the business.

(*i*) *Egan v. Guardians of Kensington Union*, 3 *Q. B.* 935, note (*a*).

(*k*) *Chorley v. Bolcott*, 4 *T. R.* 317; *Lipscombe v. Holmes*, 2 *Camp.* 441.

(*l*) Per Cur. *Poucher v. Norman*, 3 *B. & C.* 745.

(*m*) Per Best C. J. *Allison v. Haydon*, 4 *Bing.* 619.

that there was an actual contract for his remuneration. (*n*) Or if he acted both as a physician and as a surgeon, he could recover for services rendered in the latter capacity, although not for those rendered in the former. (*o*)

Since the passing of the above act, however, a physician who is registered thereunder, and who is not prohibited by the by-laws of any college of physicians from suing for his fees, can recover such fees in all cases. (*p*)

9. Printers.

In the case of *Poplett v. Stockdale*, (*q*) Best C. J. held that the plaintiff, a printer, could not recover any compensation for printing for the defendant "The Memoirs of Harriette Wilson;" it being a work of a grossly immoral and libellous nature. (*r*) And, on the other hand, if a printer, after he has printed part of a work, discover that it contains libellous matter, and in consequence thereof refuses to complete the printing of the work, he may nevertheless recover for so much as he has actually done. (*s*)

So a printer cannot recover for labor or materials used in printing a work, unless he affix his name to it, pursuant to the statute. (*t*)

(*n*) *Veitch v. Russell*, 3 Q. B. 928.

(*o*) *Battersby v. Lawrence*, Car. & M. 277; *Little v. Oldaker*, Ib. 370.

(*p*) *Gibbon v. Budd*, 2 H. & C. 92. [Where there is no restraint imposed by statute, physicians and surgeons, in the American states, have the same right as others to the benefit of that great principle of the common law, that when services are performed on request, and no special agreement is made in reference to them, the law raises an implied promise, to pay so much as the person performing them deserves to have, and an action lies upon such promise. *Hewitt v. Wilcox*, 1 Met. 154; *Towle v. Marrett*, 3 Greenl. 22; *Bailey v. Mogg*, 4 Denio, 60; *Warren v. Saxby*, 12 Vt. 146; *Judah v. M'Namee*, 3 Blackf. 269; *M'Pherson v. Cheddell*, 24 Wend. 15; *M'Clallen v. Adams*, 19 Pick. 333; *Mooney v. Lloyd*, 5 Serg. & R. 416. A physician may support his demand by his book of original entries and his own oath. See 3 Dane's Abr. 322, § 14; *Hewitt v. Wilcox*, 1 Met. 154; *Simmons v. Means*, 8 Sm. & M. 397; *Thompson v. Hazen*, 25 Maine,

104; *Smith v. Hyde*, 19 Vt. 54. See *Fisher v. Townsend*, 7 Yer. 146. Physicians and surgeons are entitled to recover for the services of their students in attendance upon their patients. *Warring v. Monroe*, (C. P.) 4 Wend. 200. In some states, a license from some designated body or society has been made necessary to the right of a physician to recover for his fees and services; and in such cases, it has been held, that an unlicensed physician cannot recover for medical attendance, though he administers medicines for which he has obtained a patent; *Smith v. Tracy*, 2 Hall, 465; *Jordan v. Dayton*, 4 Ohio, 294; *Thompson v. Staats*, 15 Wend. 395; or uses only vegetable remedies of domestic origin. *Bailey v. Mogg*, 4 Denio, 60. See *Alcott v. Barber*, 1 Wend. 526; "Apothecaries and Surgeons," and notes. (*q*) R. & M. 337; S. C. 2 C. & P. 198. (*r*) See *Gale v. Leckie*, 2 Stark. 107. (*s*) *Clay v. Yates*, 1 H. & N. 73.

(*t*) 39 Geo. 3, c. 79; *Bensley v. Bignold*, 5 B. & Ald. 335; *Marchant v. Evans*, 8 Taunt. 142.

Nor can he recover for printing, or for assisting to circulate a periodical, of which he falsely makes affidavit that he is the sole proprietor. (u) Nor can the proprietor of a newspaper recover for the non-performance of a contract for printing such paper, before filing the requisite affidavit. (x)

By the custom of trade, a printer is bound to complete and deliver the whole work, before being paid for printing it. (y) And, therefore, if the impression be destroyed by fire whilst on the premises of the printer, he cannot recover anything, although a part has been actually delivered. (z)

10. Servants.

"It is clearly agreed, that if a person retain a servant, and agree to pay him so much by the day, month, or year, the servant may have an action against the master on the contract, or against his executors; and that every such retainer will be presumed to be in consideration of wages, (a) unless the contrary appear." (b)

Hiring presumed to be for wages.

(u) *Stephens v. Robinson*, 2 C. & J. 209.

(x) *Houston v. Mills*, 1 Moo. & Rob. 325.

(y) See per Mansfield C. J. *Gillett v. Mawman*, 1 Taunt. 137, 140.

(z) *Adlard v. Booth*, 7 C. & P. 108.

(a) [But if it was originally understood by the parties that the services were rendered gratuitously, they cannot afterwards be made a charge. *James v. O'Driscoll*, 2 Bay, 101.] See the stat. 1 & 2 Will. 4, c. 37, the "Truck Act," prohibiting the payment, in certain trades, of wages in goods, or otherwise than in cash. Such payment need not be in pursuance of a previous contract. *Wilson v. Cookson*, 13 C. B. N. S. 496. Who are *workmen* or *laborers* within this act, see *Riley v. Warden*, 2 Exch. 59. Who is an "artificer" within the act; *Sharman v. Sanders*, 13 C. B. 166; *Bowers v. Lovekin*, 6 E. & B. 584; *Ingram v. Barnes*, 7 E. & B. 115; *Sleeman v. Barrett*, 2 H. & C. 934. What deductions from the wages of a workman are not within the act; *Chawner v. Cummings*, 8 Q. B. 311; *Archer v. James*, 2 B. & S. 61; 31 L. J. Q. B. 153.

(b) *Bac. Abr. Master & Servant* (H.), citing *Pinchon's case*, 9 Co. 88 a, b; *Sands*

v. Leake, 2 Roll. R. 269; *Davies v. Davies*, 9 C. & P. 87; [per Storrs J. in *Ryan v. Dayton*, 25 Conn. 191. A distinction has been taken, as to the presumptions, between cases where services have been rendered by strangers, and where they have been rendered by near relatives residing in the same family. In the former cases the presumption is as stated in the text; while in reference to the latter, it has been held that where a daughter continues to reside in her father's family after her age of majority, the same as before, the law implies no obligation on the part of the father to pay for her services. *Andrus v. Foster*, 17 Vt. 556. So, it was held in *Ridgway v. English*, 2 N. J. 409; although in this case, the daughter resided in her father's family four years after she came of age, and after the death of her mother, and during that time acted as housekeeper, and the father said to third persons, after the service and after the daughter's marriage, that "she had never been paid," and that "he meant to give her an outfit," but there was no evidence of a special contract, or of any promise. See *Munger v. Munger*, 33 N. H. 581. So, it has been held,

And a promise by the servant to obey the lawful and reasonable orders of his master, within the scope of the services contracted for, is also implied by law. (c)

Promise implied to obey reasonable orders.

But where A. covenants with B., to serve him in a

in the case of a son : *Zerbe v. Miller*, 16 Penn. St. 488 ; *Hertzog v. Hertzog*, 29 Penn. St. 455 ; *Resex v. Johnson*, 1 Smith (Ind.), 81 ; *Mosteller's Appeal*, 30 Penn. St. 473 ; *Bundy v. Hyde*, 50 N. H. 122, 123 ; *Seavey v. Seavey*, 37 N. H. 133 ; so, in the case of a son in law. *Lovet v. Price, Wright (Ohio)*, 89 ; *Guenther v. Birkicht*, 22 Mis. (1 Jones) 439. The same rule applies to cases where the person, from whom the compensation for services is claimed, took the plaintiff into his family when she was a child, to live with him until she should come of age, and she continued after that time to reside in his family, he standing *in loco parentis* to her. *Andrus v. Foster, ubi supra* ; *Davis v. Goodnow*, 27 Vt. 715. If, in such case, she claims pay, it is incumbent on her to show that the services were performed under such circumstances as to justify an expectation on his part that pecuniary compensation would be required, and on her part that it would be made. *Andrus v. Foster, ubi supra* ; *Fitch v. Peckham*, 16 Vt. 150 ; *Weir v. Weir*, 3 B. Mon. 647 ; *Davis v. Goodnow*, 27 Vt. 715 ; *Miller v. Miller*, 16 Ill. 296 ; *Candor's Appeal*, 5 Watts & S. 515. Where an infant, whilst out of place, was permitted to reside with his uncle, and during such time was provided with food and clothing, and worked in the same way as the children of the family, it was held, that the law did not imply a contract to pay for such services of the infant. *Defrance v. Austin*, 9 Barr, 309. If a step-father voluntarily assumes the position of father to his step-children, and supports them, the law deems them to have dealt with each other in the character of parent and child, and not as strangers ; and no obligation arises out of this pos-

ture of things, on the part of the father to pay them for their services, or on the part of the children to pay their father for their support. *Sharp v. Cropsey*, 11 Barb. 224 ; *Lantz v. Frey*, 14 Penn. St. 201 ; *Williams v. Hutchinson*, 3 Comst. 312 ; *Guenther v. Birkicht*, 22 Mis. (1 Jones) 439. The same rule has been applied to other classes of relatives. *Bundy v. Hyde*, 50 N. H. 116 ; *Wilcox v. Wilcox*, 48 Barb. 329 ; *Amery's Appeal*, 49 Penn. St. 126. See *King v. Sow*, 1 B. & Ald. 179 ; *House v. House*, 6 Ind. 60. The right to compensation for services, in such cases, must depend upon the circumstances of each, and this will be determined by the jury. *Guild v. Guild*, 15 Pick. 130 ; *Fitch v. Peckham*, 16 Vt. 150 ; *Andrus v. Foster*, 17 Vt. 556 ; *Davis v. Goodnow*, 27 Vt. 715 ; *Spring v. Hulett*, 104 Mass. 591 ; *Harris v. Currier*, 44 Vt. 468. In *Guild v. Guild, ubi supra*, a distinction was suggested between the case of a son, laboring, after age in the service of his father, and that of a daughter continuing to reside and perform service and receive protection and support in her father's family, and upon the presumption for or against a claim for compensation in the latter case, the court were equally divided, and no decision was had. Where it is understood, that the services are rendered in the relation of master and servant, and not in that of parent and child, the ordinary rule will of course apply. *Steel v. Steel*, 12 Penn. St. 64. So, where the services of a son are performed at the request of the father, though there is no express agreement, the law will imply a promise. *Way v. Way*, 27 Vt. 625. Where a parent goes to live with a child, it has been held, that the law will imply no promise on the part of the

(c) Per Parke B. *Turner v. Mason*, 14 M. & W. 112, 115 ; per Cur. *The King v. St. John, Devizes*, 9 B. & C. 896, 901 ;

[*Shepley C. J. in Lawrence v. Gullifer*, 38 Maine, 533.]

certain capacity for a definite time, the court will not, from this circumstance merely, imply a covenant on the part of B., to retain A. in his employment until the expiration of that time. (*d*)

Contract to employ not implied from contract to serve.

Whether or not a contract by a party, to remain in the service of his employer during the life of the former, is valid, may admit of some doubt. It would seem, however, that such a contract is not illegal, although probably but slight damages would be given for violating so improvident a bargain. (*e*)

Quere, whether contract for life valid.

It appears to be now settled, that in the case of a domestic or menial servant, a general hiring, — that is, a hiring without any engagement as to the duration of the service, — will be construed to be a hiring for a year; the service to be determined by a month's warning, or by payment of a month's wages. (*f*) And the rule is the same, although the

Effect of a general hiring in the case of a menial service.

parent to pay for boarding and necessaries furnished by the child; and that without an express promise there can be no recovery in such a case. *Linn v. Linn*, 29 Penn. St. 369. See *Commonwealth v. Griffith*, 2 Pick. (2d ed.) 19, note (1); *Shaw C. J. In re Francisco*, 9 Amer. Jur. 49.] Where a *slave*, before slavery was abolished, came over from the West Indies, and continued in the service of his master in England, it was held he was not entitled to wages, unless there had been some subsequent express contract conferring a right to them. *Alfred v. Marquis of Fitzjames*, 3 Esp. 3. But it was always considered that the party ceased to be a *slave* when he reached England, or any part of the British dominions in which slavery was not permitted. *Somerset's case*, 11 State T. 340; 20 Howell, State T. 79; Lofft, 1; *Forbes v. Cochrane*, 2 B. & C. 448.

(*d*) *Aspdin v. Austin*, 5 Q. B. 671; *Dunn v. Sayles*, Ib. 685.

(*e*) See 1 Bl. Com. 424, and note 3 of Mr. Christian. By the French law, "On ne peut engager ses services qu'à temps, ou pour une entreprise déterminée;" upon which Rogron observes, "On n'a pas dû permettre à un homme, de s'engager à servir toute sa vie une autre personne.

Une pareille stipulation serait nulle; car elle est contraire à la liberté individuelle."

[A contract by a party to remain in the service of another, during the lifetime of the latter, is valid. *Canada v. Canada*, 6 Cush. 15.]

(*f*) Per Parke B. *Turner v. Mason*, 14 M. & W. 112, 116; *Fawcett v. Cash*, 5 B. & Ad. 904, 907. A governess is not within this rule. *Todd v. Kerrick*, 8 Exch. 151. But a person who is engaged by a gentleman as his *head gardener*, and who lives in a house within the gentleman's grounds, is a *domestic servant*, within the meaning of the rule above stated. *Nowlan v. Ablett*, 2 Cr., M. & R. 54; *Johnson v. Blenkinsopp*, 5 Jur. 870. So is a *huntsman*; *Nicoll v. Greaves*, 17 C. B. N. S. 27. Servants in *husbandry* are frequently hired by the year from Michaelmas; and this is an entire hiring. *Spain v. Arnott*, 2 Stark. 257. And it seems to be now settled, that a general hiring of a husbandry servant is a yearly hiring. *Lilley v. Elwin*, 11 Q. B. 742; 12 Jur. 623; *Huttman v. Bulnois*, 2 C. & P. 511. [It does not appear that any such rule, in regard to a month's warning or payment of a month's wages, exists to any considerable extent, if at all, in the American states. See *Blaisdell v. Lewis*, 32 Maine, 515. Regulations have sometimes

c. v. C. M. a. K.

servant be hired under a written contract, provided it contain no evidence of an intention by the parties to exclude such rule. (*g*)

Accordingly, it has been held, that if a master turn away his domestic servant without such previous notice, there having been no fault or misconduct on the part of the servant, he is entitled to a month's wages, although there was no express contract to that effect. (*h*) But the month's wages are payable in such a case, not

been adopted in establishments where a great number of hands are employed, that the operatives, in such establishments, shall give a certain number of days' or weeks' notice of intention to leave before quitting the service, under penalty or forfeiture of wages, in cases of non-compliance; and such regulations have been held to be reasonable, and binding upon the operatives, if they have knowledge of the same on entering the establishment. *Harmon v. Salmon Falls Manuf. Co.* 35 Maine, 447; *Hunt v. Otis Co.* 4 Met. 464, 467. And they will be considered as having assented to such a regulation, although they may not have signed it. *Harmon v. Salmon Falls Manuf. Co. supra.* In a case where an operative entered an establishment having such a regulation, it was held, that if he would rely upon having left the service by the employer's consent, or upon having fulfilled the term for which he had contracted to labor, the burden of proof is upon him. *Harmon v. Salmon Falls Manuf. Co. supra.* Where, however, the regulation requires only that the operatives shall give previous notice of their intention to quit, and does not provide for a forfeiture of wages, they do not forfeit their wages by quitting the service, without giving such notice. Nor does the employment and service of an operative, under such a regulation known to him, constitute a special contract for specific labor for a definite period of time, the completion of which on the part of the operative, is necessary to give him a right to recover for the services actually performed. It is not a contract for a specific work, nor an agreement to labor for a specific time for an agreed sum. But the operative, in such case, would be liable to

his employer for all damages caused by not giving the notice, which may be deducted from the amount due in an action by the operative for his wages. *Hunt v. Otis Co. supra.* A knowledge of the regulation may be inferred from the fact of a delivery of a printed copy thereof to the person to be affected by it. *Harmon v. Salmon Falls Manuf. Co. supra.* But this fact would not be conclusive evidence of knowledge. *Bradley v. Salmon Falls Manuf. Co.* 30 N. H. 487. See *Rice v. Dwight Manuf. Co.* 2 Cush. 80.]

(*g*) *Johnson v. Blenkinsopp*, 5 Jur. 870.

(*h*) *Robinson v. Hindman*, 3 Esp. 235; and per *Cur. Beeston v. Collyer*, 4 Bing. 309; *sed vide* 1 Bl. Com. 425. But the reason assigned by the learned commentator for his opinion, seems not to apply to the case of *domestic servants*. See per *Abbott C. J. Huttman v. Boulnois*, 2 C. & P. 511, 512. [So, in general, where one contracts to employ another for a certain time at a specified consideration, and discharges him without cause before the expiration of the time, he is bound to pay the full amount of wages for the whole time. *Stewart v. Walker*, 14 Penn. St. 293; *Fowler v. Armour*, 24 Ala. 194; *Pond v. Wyman*, 15 Missou. 175; *Jones v. Jones*, 2 Swan (Tenn.), 605, 607, per *Totten J.*; *Byrd v. Boyd*, 4 McCord, 246. This was so held, where one was employed as a superintendent of a railroad for one year, at a salary of \$1,500, and was discharged without justifiable cause during the year, and remained without employment during the residue of the year subsequent to the discharge, having given notice to the railroad that he was ready to continue in its service. *Costigan v. Mohawk & Hudson R. R. Co.* 2 Denio, 609. See *Davis v.*

for the by-gone services, but for the improper dismissal of the servant; and, therefore, they cannot be recovered under the common count for work and labor. (*i*)

With regard, however, to cases other than those of domestic or menial servants, — although it would appear that a general hiring, if unexplained, will be taken to have been a hiring for a year, (*k*) — still there is no inflexible rule of law, that a general hiring is a hiring for a year; and the question must, therefore, be considered in connection with the circumstances of each particular case. (*l*)

Thus, the fact of the servant's wages having been paid at shorter intervals than a year, may rebut the presumption of a yearly hiring. (*m*)

So, if there be a usage in the particular trade, as to the time or manner of putting an end to a general hiring, such usage will be taken, in the absence of evidence to the contrary, to form part of the contract between the parties. (*n*)

The case of *Beeston v. Collyer* (*o*) is usually referred to as an authority that, if there be no evidence to the contrary, the general engagement of a clerk will be deemed to be a yearly hiring. But in a late case in the court of exchequer, it was said, by Pollock C. B., that from much experience of juries, he had come to the conclusion, that the general hiring of a clerk was not usually a hiring for a year, but rather a hiring determinable by three months' notice. (*p*) And the other members of the court appear to have agreed in this opinion.

So where a party is engaged, not as a clerk or servant, but as a commission agent, and, by the terms of the engagement, he is to receive for his commission at the rate of a certain sum per quarter; this is not even *primâ facie* evidence of a quarterly hiring. (*q*)

And in all cases of contracts between master and servant,

- Ayres, 9 Ala. 292; *Miller v. Goddard*, 34 Maine, 102; *Little v. Mercer*, 9 Missou. 218; *St. Louis v. McDonald*, 10 Missou. 609.]
- (*i*) *Fewings v. Tisdal*, 1 Exch. 295.
- (*k*) Per Parke B. *Bayley v. Rimmell*, 1 M. & W. 506, 507.
- (*l*) *Baxter v. Nurse*, 6 M. & G. 935; 163. and see *Down v. Pinto*, 9 Exch. 327.
- (*m*) Per Cresswell J. *Baxter v. Nurse*, 6 M. & G. 935, 941.
- (*n*) *Metzner v. Bolton*, 9 Exch. 518.
- (*o*) 4 Bing. 309; and see *Huttman v. Boulnois*, 2 C. & P. 510.
- (*p*) *Fairman v. Oakford*, 5 H. & N. 635.
- (*q*) See *Butterfield v. Marler*, 3 C. & K.

Contract dissolved by death. the death of either party dissolves the contract, unless there be a stipulation, express or implied, to the contrary. (*r*)

A contract for the hire and service of an agent, clerk, or servant need not be in writing, unless, by the terms of the bargain, the employment is to extend beyond a year; in which case a written agreement is necessary, under the 4th section of the statute of frauds, 29 Car. 2, c. 3. (*s*) But a contract of hiring for a year, or from which a yearly hiring may be implied, need not be reduced into writing; (*t*) [unless the term of service is to commence at a period subsequent to the date of the hiring.] (*t*¹)

So where the agreement is in writing, the consideration for the servant's promise to remain in the master's employ should appear on the face thereof. And a written promise by a party "to remain with the plaintiff for two years, for the purpose of *learning* his business," was held to be invalid for want of mutuality; it not appearing from the memorandum, that the plaintiff was bound to retain or teach the defendant, during any part of that period. (*u*)

But this need not be expressly stated on the face of the memorandum; for if it appear by reasonable intendment therefrom, that will be sufficient. (*x*)

(*r*) *Farrow v. Wilson*, L. Rep. 4 C. P. 744.

(*s*) *Dobson v. Collis*, 1 H. & N. 81; *Bracegirdle v. Heald*, 1 B. & Ald. 722. [A parol contract that the son of A. shall serve B. for the term of four years, is void under the statute of frauds, as being a contract not to be performed within a year. And the operation of the statute is not avoided by a service of a few months under the contract. *Squire v. Whipple*, 1 Vt. 69; *Tuttle v. Swett*, 31 Maine, 555; *Hill v. Hooper*, 1 Gray, 131. See *Drummond v. Burrell*, 13 Wend. 307; *Herrin v. Butters*, 20 Maine, 119; *Pitcher v. Wilson*, 5 Missou. 46. The fact that payment for the services is to be made in semi-annual instalments, does not avoid the operation of the statute. *Hill v. Hooper*, *ubi supra*. See *Giraud v. Richmond*, 2 M., G. & S. 835; *Drummond v. Burrell*, 13 Wend. 307.]

(*t*) *Beeston v. Collyer*, 4 Bing. 309.

(*t*¹) [An oral contract, which bound a party to labor for one year, to commence at a future day, two or three days after the making of the contract, was held to be within the statute. *King v. Welcome*, 5 Gray, 41; *Comes v. Lamson*, 16 Conn. 246; *Terry v. Brown*, 25 Conn. 395. But where the plaintiff and defendant entered into a contract, by which the plaintiff agreed to labor for the defendant for one year, but without fixing any definite time for the labor to commence, it was held that the contract was not within the statute, for the plaintiff had a right to commence immediately. *Russell v. Slade*, 12 Conn. 455.]

(*u*) *Pilkington v. Scott*, 15 M. & W. 657; *Sykes v. Dixon*, 9 A. & E. 693; *Hartley v. Cummings*, 2 C. & K. 433; *Lees v. Whitecomb*, 5 Bing. 34.

(*x*) *Reg. v. Welch*, 2 E. & B. 357.

Where the hiring is for a year, and so from year to year so long as the parties respectively please, it can be determined only by reasonable notice, expiring at the end of some year of the service. (y) And where the engagement was "for twelve months certain," and to "continue from time to time, until three months' notice in writing be given by either party, to determine the same;" it was held, that it might be put an end to at the expiration of the first year by giving three months' previous notice. (z)

To what notice to leave a servant is entitled.

But if a servant wilfully disobey any lawful order of his master; or unlawfully absent himself from his work; or if he be guilty of moral misconduct, or habitual neglect; (a) or if he engage to render any particular service, and prove to be incompetent, (b) or refuse or neglect to render it, (c) he may be discharged without warning, before the expiration of the period for which he was hired; and he is not entitled to any wages from the day he is so discharged, if they had not then accrued due. (d)

When he may be dismissed without notice.

(y) *Williams v. Byrne*, 7 A. & E. 177.

(z) *Brown v. Symons*, 8 C. B. N. S. 208.

(a) *Turner v. Mason*, 14 M. & W. 112, 116; *Amor v. Fearon*, 9 A. & E. 548; *Lilley v. Elwin*, 11 Q. B. 742; 12 Jur. 623, 626; *Callo v. Brouncker*, 4 C. & P. 518; *Spain v. Arnott*, 2 Stark. 257. See, also, *Smith v. Thompson*, 8 C. B. 44; *Turner v. Robinson*, 5 B. & Ad. 789; *Baillie v. Kell*, 6 Scott, 379; *Lacy v. Osbaldiston*, 8 C. & P. 80.

(b) *Harmer v. Cornelius*, 5 C. B. N. S. 236.

(c) See *Lomax v. Arding*, 10 Exch. 734.

(d) *Robinson v. Hindman*, 3 Esp. 235; *Spain v. Arnott*, 2 Stark. 256; *Gandell v. Pontigny*, 4 Camp. 375; S. C. 1 Stark. 198; *Atkin v. Acton*, 4 C. & P. 208. In *Crawford v. Reid*, 1 Show. Par. C. 124, it was held, that if a principal gardener absent himself for four days upon an unfounded pretence, he may be immediately discharged, though engaged for a fixed period. If a female servant become pregnant, she may be dismissed at once. *Caldecot*, 11, 14. As to the jurisdiction of justices, see *Burns J. tit. Servants; Lan-*

caster v. Greaves, 9 B. & C. 628. A game-keeper or bailiff may be dismissed for misconduct, and expelled from a house of his employer, which he occupied as a servant. *Anon. Moore*, 8, 9; *Curtis's case*, Litt. Rep. 139; *Bertie v. Beaumont*, 16 East, 33. But where an apprentice is bound in the usual form, he cannot be discharged for misconduct. *Phillips v. Clift*, 4 H. & N. 168; *Winstone v. Linn*, 1 B. & C. 460. [It was said by Totten J. in *Jones v. Jones*, 2 Swan (Tenn.), 605, 608, to be sufficient cause for discharging an overseer from a plantation, "if he be guilty of cruelty to the slaves under his care and protection, or of bad and indiscreet management in their government and control, or if he be unskilful and improvident in the management of the farm and interests under his charge." A servant may be dismissed who assaults his master's servant maid, with intent to commit a rape upon her. *Atkin v. Acton*, 4 C. & P. 208. The use of abusive language to the employer is sufficient ground of discharge. *Byrd v. Boyd*, 4 McCord, 246. So, a course of conduct which materially injures the employer's business, or such as is inconsistent with the relation of the parties as master and

[It seems now to be well established by a long series of decisions both in England and in the United States, that if the contract of the servant to labor, be for a specified period of time, and payment is to be made, either expressly or by implication of law, (*d*¹) at the end of the period, and the servant leaves the service of his master improperly and without sufficient cause, (*d*²) before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit*. (*d*³)

servant. *Lacy v. Osbaldiston*, 8 C. & P. 80; *Singer v. McCormick*, 4 W. & S. 265.]

(*d*¹) [In a case where the contract was for seven months, at twelve dollars per month, *Hubbard J.* said: "There is no time fixed for the payment, and the law therefore fixes the time, and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed." *Davis v. Maxwell*, 12 Met. 286, 290; *Beach v. Mullin*, 5 Vroom (N. J.), 343.]

(*d*²) [It is not a sufficient cause for abandoning a contract to labor for a specified period, that the party employed was put upon work not contemplated at the time the contract was made, with his own consent; *Mullen v. Gilkinson*, 19 Vt. 503; or without objection made by him. *Hair v. Bell*, 6 Vt. 35. See *Decamp v. Stevens*, 4 Blackf. 24. The use of harsh language by the employer is not a sufficient cause to entitle the laborer to abandon his contract. *Forsyth v. Hastings*, 27 Vt. 646. A hired girl, who had contracted to labor for a specified term at a price agreed upon, and who had left the service of her employer previous to the expiration of the term, was yet allowed to recover for the labor actually performed by her, where it appeared that she left in consequence of rudeness and improper conduct towards her by a member of another family residing in the same house, although it appeared that her employer had no control over the other family, and that the two families were as distinct as they could be while

occupying the same house. *Patterson v. Gage*, 23 Vt. 558.]

(*d*³) [Such is the rule in England. The cases will be found cited in *Smith's note to Cutter v. Powell*, 6 T. R. 320; in 2 *Smith Lead. Cas.* 1 *et seq.*; *Huttman v. Boulnois*, 2 C. & P. 510; *Appleby v. Dods*, 8 East, 300. So in Massachusetts. *Stark v. Parker*, 2 Pick. 276; *Olmstead v. Beale*, 19 Pick. 528; *Hunt v. Otis Manuf. Co.* 4 Met. 265; *Davis v. Maxwell*, 12 Met. 286; *Rice v. Dwight Manuf. Co.* 2 Cush. 80. So in Maine. *Miller v. Goddard*, 34 Maine, 102. So in Vermont. *Philbrook v. Belknap*, 6 Vt. 333; *St. Albans Steamboat Co. v. Williams*, 8 Vt. 54; *Hair v. Bell*, 6 Vt. 35; *Mullen v. Gilkinson*, 19 Vt. 503; *Winn v. Southgate*, 17 Vt. 355; *Mack v. Bragg*, 30 Vt. 571. So in New York. *Lantry v. Parks*, 8 Cowen, 63; *Marsh v. Russellson*, 1 Wend. 514; *Monell v. Burns*, 4 Denio, 121. So in Illinois. *Eldridge v. Rowe*, 2 Gilman, 91. So in Alabama. *Wright v. Turner*, 1 Stewart, 29. See, also, *Byrd v. Boyd*, 4 McCord, 246; *Shaw v. Turnpike Co.* 2 Penn. 454; *M'Clure v. Pyatt*, 4 McCord, 26; *Rounds v. Baxter*, 4 Greenl. 454, 458; *M'Millan v. Vanderlip*, 12 John. 165; *Thorpe v. White*, 13 John. 58; 2 *Dane Abr.* 314, sec. 7. So in Missouri. *Schnerr v. Lemp*, 19 Missou. (4 Bennett) 40. So in California. *Hutchinson v. Wetmore*, 2 Cal. 310. A school-teacher who contracts to teach for a definite term, and leaves before that term is finished without excuse, cannot recover anything for his part performance. *Clark v. School District, Pawlet*, 29 Vt. 217. The current of

So, if the contract is for a specified time, and payments are to be made at intervals by instalments; as, if the contract is for a year's service, payments to be made quarterly, or monthly, or at any other fixed period; and the servant improperly leaves the master during the currency of

Contract for specified time, and payments by instalments.

these decisions runs so strong, that it is perhaps impossible successfully to stem it; yet it is manifest, that cases may occur, and are very likely to occur, where the rule stated in the text would operate quite harshly and unequally. As, where it appeared that a party had worked several months under a contract to labor for a given period, but left the service without sufficient cause before the termination of that period, it was held that he could not recover for what he had done, although within a few days he returned and offered to fulfil his contract, the employer refusing to receive him. *Lantry v. Parks*, 8 Cowen, 63. And it is difficult to discover a reason, emanating from any principle of equality or justice, for holding that a servant who has been wrongfully dismissed by his master, before his term of service has expired, shall be held to allow for other eligible employment he might obtain during the residue of his term, which would not, on the other hand, require that the master, when the servant has wrongfully deserted his service, should procure the services of another servant to fulfil the same employment, and then allow to the former the amount agreed to be paid, after deducting therefrom the wages paid to the latter, and any damages and trouble suffered in consequence of the change of servants and procurement of a substitute. In *Britton v. Turner*, 6 N. H. 481, Parker J. speaking in opposition to the rule established by the above decisions, said: "That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages, which the other party has sustained by reason of such non-performance,

which in many instances may be trifling — whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance, — although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage — is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfilment of the remainder, upon the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action. The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is \$95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff; a sum not only utterly disproportionate to any probable, not to say any possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could

such quarterly, monthly, or other period, he is not entitled to

have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract." The learned judge then referred to *Lantry v. Parks*, *supra*, as another illustration of the harshness of the rule; and, after citing and commenting upon the decisions in relation to other classes of contracts, where parties have been allowed to recover for partial performance, although they have failed to fulfil the entire contracts, he adds: "In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it — that the contract being entire there can be no apportionment — and that there being an express contract no other can be implied, even upon the subsequent performance of service — is not properly applicable to this species of contract, where a beneficial service has been actually performed. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. It is easy, if parties choose, to provide by an express agreement that nothing shall be earned if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretence for a recovery, if he voluntarily deserts the service before the expiration of the time. The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction, and, in estimating the value of the labor, the contract price for the service cannot be exceeded." This decision has been followed in subsequent cases in New Hampshire. See *Elliot v. Heath*, 14 N. H. 131; *Laton v. King*, 19 N. H. 280. In *Davis v. Barrington*, 30 N. H. 529, the case of *Britton v. Turner* was referred to, and *Woods C. J.*, after stating

the objections to the rule adopted in it, in conclusion, said: "We, on the whole, are not inclined to disturb the doctrines of that case, but to adopt and apply them." See, also, *Page v. Marsh*, 30 N. H. 305, 308. The case of *Britton v. Turner* has been frequently cited in the courts of other states, and in various text books, sometimes in the former and generally in the latter with apparent approval. See *Fenton v. Clark*, 11 Vt. 560; *Gilman v. Hall*, 11 Vt. 510; *Blood v. Enos*, 12 Vt. 625; 2 Smith Lead. Cas. 21, note of American editor to *Cutter v. Powell*. But it has not been yielded to as an authority, and the courts of other states in cases since decided, have sustained the doctrine of their former decisions. See *Miller v. Goddard*, 34 Maine, 102; *Olmstead v. Beale*, 19 Pick. 528, 529; *Eldridge v. Rowe*, 2 Gilman, 91; *Davis v. Maxwell*, 12 Met. 286. If one enters into the service of another, under a special contract to labor for a specified period, and leaves before the end of the term, so that he cannot recover of his employer for the services performed, and the employer then promises the party employed to pay him for the services performed upon the performance of any additional service, however slight, or the doing of some act by the party employed to his personal inconvenience, though of no value to the employer, and such service is rendered or the act done, this will so far operate as a waiver of the original contract, that an action may be sustained by the party employed for the labor performed under it. *Rice v. The Dwight Manuf. Co.* 2 Cush. 80. See, also, *Seaver v. Morse*, 20 Vt. 620; *Thorpe v. White*, 13 John. 53. Whether such promise by the employer without any such consideration would not be binding, see *Seaver v. Morse*, 20 Vt. 620. If the employer has given the laborer a note, before the period of service under a special contract has expired, for the amount of wages already earned, he cannot defend against the note on the ground that the laborer left his service before the termination of the time stipulated in the

wages for any part thereof, even to the day he quits. (*d*⁴) Still, when, by performance of the service for the quarterly, monthly, or

contract. *Thorpe v. White*, 13 John. 53. So, where money has been paid, in such case, it cannot be recovered back. *Lord v. Belknap*, 1 Cush. 279.]

(*d*⁴) [*Huttman v. Boulnois*, 2 C. & P. 510. In *White v. Atkins*, 8 Cush. 367, it was decided that one, who agrees to work for another a year for a certain sum named, payable monthly, if the former wishes, may, at any time during the year, demand payment of the wages due him for the *entire* months then elapsed; and his right to monthly payment is not waived by neglecting to demand the same monthly. In this case *Shaw C. J.* said: "The same contract may embrace some stipulations that are dependent, some independent. The present contract is of this character. The performance of a year's service was necessarily independent, and could not be a condition precedent to a monthly payment within the year. But as the monthly payments were to be made for services actually to be done, the performance of a month's service was a condition precedent to the right to recover a month's wages, and these, therefore, were dependent stipulations." Where the contract was for services during a period embracing many months, payment to be made at a certain rate each month, and the party employed wrongfully abandoned the service during the currency of one of the monthly periods, *Pollock C. J.* said: "Clearly he could not recover anything under the *indebitatus* count for the broken month." *Goodman v. Pocock*, 15 Q. B. 576; *Taylor v. Laird*, 1 H. & N. 266. See *Snook v. Fries*, 19 Barb. 313. It does not always follow, however, from the fact that a party has engaged to labor for a specified period at a certain rate per month, that the wages are to be paid monthly. The contract may still be entire, and no payment become due until the expiration of the whole specified period. Each case of this kind will depend upon the construction to be given to the terms of the contract. In *Davis v. Maxwell*, 12 Met. 286, a party had agreed to

work for another, on the farm of the latter, for "seven months, at twelve dollars per month," and it was held that the contract was entire, that eighty-four dollars were to be paid at the end of seven months, and not twelve dollars at the end of each month; and that the laborer, on leaving the service of his employer, without good cause, before the seven months expired, was not entitled to recover anything of the employer. *Hubbard J.* said: "The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract that is proved. There is no time fixed for the payment, and the law, therefore, fixes the time; and this is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment, in case the contract should be given up by consent, or death or other casualty should determine it before its expiration, without affecting the right of the party. Such contracts for hire, for definite periods of time, are reasonable and convenient, are founded in practical wisdom, and have long received the sanction of the law." So it was held also in *Badgley v. Heald*, 4 Gilman, 64. So, where an agreement was made, that the plaintiff was to work for the defendant "for eight months, for which the defendant was to pay him \$104, or \$13 per month," it was held that the contract was entire, and that the plaintiff could not sue for his hire until he had served out his whole time. *Reab v. Moor*, 19 John. 337. See *Thayer v. Wadsworth*, 19 Pick. 349; *Hutchinson v. Wetmore*, 2 Cal. 310; *Baker v. Higgins*, 21 N. Y. 397. So, in another case, where the plaintiff agreed to work for the defendant ten and a half months, and spin yarn "at three cents *per*

other period, any one of the periodical payments falls due, the right to receive it becomes vested, and this right is not lost or divested by any subsequent desertion or abandonment of the contract by the servant. (*d*^b)

It has been held, in England, that the dismissal of a servant, for such misconduct as justifies his discharge, will deprive him of wages in the same cases and to the same extent as his wrongful desertion of his master's service will. (*d*^b) But a different rule has been adopted in Maine and several other states of the Union, and the servant has been allowed to recover, even after a dismissal for good cause, at least so far as his services have been beneficial to his employer. (*e*)

run," it was held, that the contract was entire, and must be performed before the plaintiff could recover for the price of his labor, and if he leaves the service of the defendant before the expiration of the time, he cannot recover for spinning a certain number of runs of yarn. *M'Millan v. Vanderlip*, 12 John. 165. But in *Taylor v. Laird*, 1 H. & N. 266, it appeared that the defendant wrote to the plaintiff offering to engage him for the command of a steamer destined for an exploring and trading voyage up the River Niger, paying him at the rate of 50*l.* a month, commencing from the first of December, 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade." The plaintiff received 50*l.* a month for seven months, and afterwards proceeded on the voyage, in command of the vessel; but before the expiration of the ninth month, wrongfully abandoned the vessel. It was held, that the contract, whether taken as constituted by the plaintiff's letter, or by the defendant's letter as explained by the plaintiff's, gave a cause of action at the expiration of each month, and that the plaintiff was entitled to recover the 50*l.* for the eighth month on an *indebitatus* count.]

(*d*^b) [*Taylor v. Laird*, 1 H. & N. 266; and see *Button v. Thompson*, L. R. 4 C. P. 330; *White v. Atkins*, 8 Cush. 367.

And, in like manner, where, at the time of the death of the master or the servant, any right of action arising out of that relationship was vested in either, such right of action is not divested by his death. *Stubbs v. Holywell Railway Co.* L. R. 2 Exch. 311.]

(*d*^b) [*Lilley v. Elwin*, 11 Q. B. 742; *Ridgway v. Hungerford Musket Company*, 3 Ad. & El. 171. See *Atkins v. Acton*, 4 C. & P. 208, 209. *Turner v. Robinson*, 6 C. & P. 15; *Callo v. Brouncker*, 4 C. & P. 518; *Turner v. Robinson*, 5 B. & Ad. 789; *Beach v. Mullin*, 5 Vroom (N. J.), 343.]

(*e*) [In *Jones v. Jones*, 2 Swan (Tenn.), 605, it was held, that though the person hired for a stated period is discharged for sufficient cause, he may still recover on a *quantum meruit* for the services actually rendered. So, where an overseer on a plantation had been justifiably discharged for using abusive language; but his services had been beneficial to his employer, he was allowed compensation, in South Carolina, to the extent of that benefit. *Eakin v. Harrison*, 4 McCord, 249; *Byrd v. Boyd*, 4 McCord, 246. See *Robinson v. Sanders*, 24 Miss. 391. In *Lawrence v. Gullifer*, 38 Maine, 532, it was decided, that if a party hires out, by the month, at stipulated wages, and before his time expires is rightfully discharged on account of his misconduct, he is nevertheless entitled to recover the value of his services, not ex-

If a party is prevented, by sickness or other similar inability occasioned by a visitation of Providence, from laboring during the stipulated period, he may recover for the services performed upon a *quantum meruit*. (f) The amount to be recovered will depend upon the extent of the benefit the employer, has derived from the partial

Party unable to labor the specified time, in consequence of sickness, &c.

ceeding the contract price. And in such case, he will not be liable for any damages the employer may suffer by being obliged to hire another person. But in this case, Shepley C. J. said : " Where the employer is required to pay the laborer, not the full contract price, but only for the actual value of his services, he can have no just cause for complaint, unless the laborer has *intentionally and wilfully* conducted in such a manner as to render it necessary that he should be discharged. It is only when he does this that he is required to pay other damages than the loss of his agreed compensation ; and when he does this, he may justly be required, as in other cases of a voluntary and wilful violation of his contract, to make compensation for the injury occasioned by his not continuing to labor for the whole stipulated time, although he may have been discharged by his employer." See *Hill v. Green*, 4 Pick. 114 ; *Daggett C. J. in Champion v. Hartshorn*, 9 Conn. 574.]

(f) *Fenton v. Clark*, 11 Vt. 557 ; *Fulmer v. Brown*, 11 Met. 440 ; *Dickey v. Linscott*, 20 Maine, 453 ; *Hubbard v. Belden*, 27 Vt. 645 ; *McMullen v. Kelso*, 4 Texas, 235 ; *Fahy v. North*, 19 Barb. 341 ; *Ryan v. Dayton*, 25 Conn. 188 ; *Lakeman v. Pollard*, 43 Maine, 463 ; *Wolfe v. Howes*, 24 Barb. 174. In *Fenton v. Clark*, *supra*, *Bennett J.* said : " In the case before the court, the plaintiff contracted with the defendant to labor personally for him for four months, at ten dollars per month, and, by the terms of the contract, was to receive no pay till he had worked the four months. These services being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of

God, upon the authority of the foregoing cases, the contract was discharged. To hold, in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment, upon the technical ground that the contract is entire, and its performance a condition precedent, is, to my mind, leaving the substance and adhering to the shadow." In *Seaver v. Morse*, 20 Vt. 620, it appeared that the plaintiff had contracted to labor for the defendant six months, at a specified price, for the term, but was taken sick and left the defendant's service before the term had expired, and remained so sick for about a month, that he was unable to perform the full labor of a man, and then he recovered his health, but did not return to the defendant's employment ; it was held, that he was entitled to recover for his services upon a *quantum meruit* for the time he labored. See *Nichols v. Coolahan*, 10 Met. 449 ; *Hunter v. Waldron*, 7 Ala. 753 ; *Thomas v. Woodruff*, 2 Speers, 148. In *Dickey v. Linscott*, *supra*, the action was brought by an employer against the laborer to recover damages for a breach of a contract to labor for the plaintiff for seven months, at a certain rate per month. After the contract was made, but before the time for commencing the labor, the defendant became sick and unable to work, and continued so for some time, but not during the whole seven months. *Weston C. J.* said : " In a contract for the performance of personal manual labor, requiring health and strength, we think it must be understood to be subject to the implied condition, that health and strength remain. If, by the act of God, one half or three fourths of the strength of the contracting party is taken away, performance to the

performance. (g) If the party recovers from his sickness, and offers to resume his work during the agreed term, and the employer rejects the offer, the laborer may then treat the special agreement as rescinded, and may recover for the services already rendered, without waiting

Effect of offer to return after recovery from sickness.

extent of his remaining ability, would be hardly thought to entitle him to the compensation for which he may have stipulated, while an able-bodied man. There may be cases where the hazard of health is assumed by the employer. This might be regulated by known and settled usage. Generally, however, the right to wages depends upon the actual performance of labor. On the other hand, it is not expected, that the laboring party should be subjected to any other loss, where his inability arises from the visitation of Providence. It seems from the evidence, that the defendant might have labored a month or two the latter part of the stipulated period. But the contract was entire, beginning at a time when the days are shortest, and covering principally the season when the earth cannot be cultivated. The wages were to be at a certain monthly rate. The contract failing without the fault of the defendant, it would be neither just nor equitable, to hold him obliged to labor for the plaintiff, at the monthly wages stipulated, when the days were longest, and labor in husbandry most valuable. The plaintiff was not obliged to accept such partial performance. He had a right to secure the services of another man, and might have had as many laborers as it was for his interest to employ." In *Fuller v. Brown*, *supra*, a special agreement was made between the plaintiff and the defendant, that the plaintiff should work for the defendant, and that if he should be dis-

satisfied and wish to leave the service, he would give the defendant four weeks' notice, and work for him four weeks after the notice, and then receive his pay; after the plaintiff had begun to work under this agreement, he became sick and unable to work, and left the defendant without giving four weeks' notice, and remained sick for several weeks: it was held, that this agreement as to notice applied to a voluntary leaving of the service by the plaintiff, and not to a leaving by reason of his sickness and inability to continue therein; and that he was entitled to recover a proper compensation for the work he had done. In *Nichols v. Coolahan*, 10 Met. 449, it appeared that an agreement had been made between the plaintiff and defendant, that the plaintiff should have eleven dollars per month and board, so long as he should work for the defendant; the defendant informing the plaintiff that he might not have two days' work for him; the plaintiff worked under this agreement for several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave the defendant credit for a certain sum on account of three weeks' sickness of the plaintiff, during which time he was unable to work; the defendant filed in set-off an account against the plaintiff for his board during his sickness; it was held, that the contract was a hiring by the month; that the defendant was not entitled to payment for

(g) *Patrick v. Putnam*, 27 Vt. 759. See *Hillyard v. Crabtree*, 11 Texas, 264; *Fenton v. Clark*, 11 Vt. 557; *Ryan v. Dayton*, 25 Conn. 188, 194. In *Fuller v. Brown*, *supra*, *Dewey J.* said: "No question was raised before us as to the amount to be recovered for the services actually performed; whether it was to be at the

rate per month stipulated for the entire period, or for a proper compensation for the time, taking into consideration the contract for the whole period, and the relative value of the labor for that part of it in which the plaintiff was in the service of the defendants; and we express no opinion upon that point."

for the expiration of the time fixed in the agreement for its performance.] (*h*)

So, where the contract is determined by mutual consent, the servant may recover wages *pro ratâ*. (*i*) [So where ever the employer has broken and determined the contract on his part, the party employed may treat it as determined, and may recover on the common counts the value of his services previously rendered.] (*i*¹)

Where contract determined by consent.

So, where there is no evidence of any specific contract of hiring, but merely proof of service, and it is shown that the party volun-

the plaintiff's board during his sickness; but that the plaintiff could not, after giving credit as above, recover wages for any part of the time of his detention from work by sickness. Hubbard J. said: "Another question might have been raised on this contract, viz., whether the plaintiff might not have been entitled to payment for his whole time; but, by crediting the loss of time, he has precluded that inquiry, and is properly bound by his admission." So, where from the prevalence of a fatal disease in the vicinity of the place where one had contracted to labor for a specified time, the danger was such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there; it was held, that this was sufficient cause for not fulfilling the contract. *Lakeman v. Pollard*, 43 Maine, 463.]

(*h*) [*Ryan v. Dayton*, 25 Conn. 188. In this case, Storrs J. said: "Considering it as a valid agreement, if the omission of the plaintiff, during the time when he was disabled by sickness from laboring for the defendant, was a violation of the special contract between them, it justified the defendant in refusing to receive the plaintiff back into his service; but if it was not, it constituted no such justification, and the plaintiff had the right to treat, as he did, such refusal as a rescission of the contract by the defendant, and thereupon to bring an action on the promise, which the law would, on the abandonment of that contract, imply on the part of the defendant, to pay the value of the services which had been rendered. And, as an end would thus

be put to the special contract, and the plaintiff's right to recover would rest only on such implied promise, he would not be bound to wait until the expiration of the time fixed by that contract for its performance, as he must have done if it were not rescinded, and he had sought to enforce it, but might sue immediately."]

(*i*) *Lamburn v. Cruden*, 2 M. & G. 253; 2 Scott N. R. 533; *Thomas v. Williams*, 1 A. & E. 685; [*Cranmer v. Graham*, 1 Blackf. 407; *Rogers v. Steele*, 24 Vt. 513. Where there is a proviso in the special contract for labor, that if either party becomes dissatisfied, he may abandon the contract, and the party employed quits before the time of service expires, without alleging any dissatisfaction, he cannot recover for the labor performed. *Monell v. Burns*, 4 Denio, 121. But it was held otherwise, where there was a contract for labor for a specified time, at stipulated wages, "if the parties could agree." *Durgin v. Baker*, 32 Maine, 273.]

(*i*¹) [This was held, in a case where a party entered into a special engagement to carry on a farm for the owner during his life, in consideration of receiving the same in compensation of such services at the decease of the owner, which was broken and determined on the part of the owner, by a conveyance of a part of the farm; the other party was allowed to treat the contract as at an end, and recover, on the common counts, the value of the services previously rendered. *Canada v. Canada*, 6 Cush. 15. See *Cranmer v. Graham*, 1 Blackf. 407; 2 Greenl. Ev. § 104.]

tarily quitted his employment ; he will be entitled to be paid for his services up to the time of his so quitting, so much as they were worth. (*k*)

(*k*) *Bayley v. Rimmell*, 1 M. & W. 506. [And even where a special contract for services at a particular rate of wages has been made, but it is inoperative under the statute of frauds because oral and not to be performed within a year, it has been held that the laborer, having partly performed the contract, may quit the service before the expiration of the term, and recover for what he has done upon a *quantum meruit*, and the special agreement cannot be set up in defence. *King v. Welcome*, 5 Gray, 41 ; *Comes v. Lamson*, 16 Conn. 246. These cases seem, however, to be opposed in principle to that class of decisions in which it has been held, that money paid or advanced by the purchaser upon an oral contract, for the conveyance of land, cannot be recovered back while the vendor is able and willing to convey. *Coughlin v. Knowles*, 7 Met. 57 ; *Duncan v. Beard*, 8 Dana, 101 ; *Sims v. Hutchins*, 8 Sm. & M. 328 ; *Shaw v. Shaw*, 6 Vt. 69 ; *Cobb v. Hall*, 29 Vt. 510 ; *Smith v. Smith*, 14 Vt. 440 ; *Mack v. Bragg*, 30 Vt. 571 ; *Collier v. Coates*, 17 Barb. 471 ; *Oldham v. Sale*, 1 B. Mon. 78. The above cases of *King v. Welcome*, and *Comes v. Lamson*, are also in direct conflict with *Philbrook v. Belknap*, 6 Vt. 383 ; *Foote v. Emerson*, 10 Vt. 338 ; *Leroux v. Brown*, 12 C. B. 801. The decision in *Comes v. Lamson* has been commented upon in a subsequent case (*Clark v. Terry*, 25 Conn. 395) in Connecticut, and very much limited and restrained in its operation. In this latter case *Hinman J.* said : " It would obviously be unjust for a party to contract to labor for a year and a day, at a stipulated rate of wages, to be paid at the end of the term, and, after he had labored half the term, refuse to go on, and demand immediate payment for the wages earned, before the expiration of the time. The case of *Comes v. Lamson* shows that a just and legal claim cannot be resisted, on the ground that the service was performed

under a contract, which is inoperative by reason of the statute ; but this does not imply that services performed under such a contract stand upon the same footing in respect to the compensation to be paid therefor, as if no such contract had been made. On the contrary, it is said in that case, that where a person has entered into a contract for service, and has made the performance on his part a condition precedent to his right to recover, he cannot enforce payment. And it may be added that, so long as there is nothing illegal in the condition, it does not become void merely because it constitutes part of the terms of a contract which cannot be enforced by action. In respect to the amount of compensation for such services the rule must be the same as that which prevails where services have been performed under a special contract, the terms of which have not been complied with, but the services have nevertheless been of benefit to the other party, and he has accepted them by receiving the benefit. In this class of cases, we suppose the amount of such benefit, rather than the ordinary value of such services, is the rule. In the case of *Comes v. Lamson*, it was said the parties contracted with full knowledge of the law which entered into and formed a part of the contract ; and on the ground that they knew no suit could be maintained on it if it was not performed, the court would not presume that the intention was that nothing should be paid for any service less than the full term, which might be rendered under it. But had the contract been of such a nature as to exclude the idea of any compensation, unless the party served the full term, the fair inference is, that nothing would have been recovered in that case. That decision, then, does not go to the extent claimed for it on the part of the plaintiff, — that the terms of such a contract are to be wholly disregarded in a suit for wages earned under it ; and that

Where a servant sues for wages, and the defendant pleads that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing or able to render the agreed service; this plea will not be

Effect of service being prevented by sickness.

they cannot be shown for any purpose. On the contrary, the reasoning of the court is based on the assumption that, for the purpose of showing that the claim for wages is unjust, the contract may be proved. Now, in respect to the question whether wages have been earned which ought to be paid for, and if so, to what extent or amount, and when the payment ought to be made, it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered. A person agrees to labor for another for a period longer than a year, at a low rate of wages; can he leave just before the expiration of the time, and then demand the ordinary rate? And in such a case cannot the employer show the contract in order to regulate the rate? And if he can do it for this purpose, can he not also do it for the purpose of showing when, by the terms of the contract, he was to pay the wages?" See *Ryan v. Dayton*, 25 Conn. 188, 191, 192. In the case of *Clark v. Terry*, the facts were very similar to those in *King v. Welcome*. A., in February, orally agreed to labor for B. for one year from the 1st day of April next following, at a specified price per day, payable at the end of each half year. A. commenced laboring under the contract on the 1st day of April, and continued till the 11th day of June, when, without sufficient cause, he left the service of B., and in July next following, brought an action of assumpsit to recover for the labor performed, claiming that the contract was inoperative by reason of the statute of frauds. It was held, that the terms of the contract were nevertheless to be considered, in determining the time when payment was to be made, and that the suit having been instituted before the

time when, by the contract, the first payment was to be made, was prematurely brought. In *King v. Welcome*, it appeared that there was a special contract not in writing, which bound the plaintiff to labor for one year, to commence at a future day, — two or three days after the making of the contract. The plaintiff left the service before the year expired. The amount and value of the plaintiff's services actually rendered were not disputed. It does not appear from the report of the case whether the action was brought before or after the year had expired. The action, which was on a *quantum meruit* for work and labor, was sustained on the ground that the plaintiff had performed useful labor for the defendant; and that the defence, that the work was done under an entire contract not fulfilled, which would otherwise have been a good defence, was unavailing as such in this case, because that contract was inoperative under the statute of frauds. Neither did it appear in *Comes v. Lamson*, in which the facts and the decision are similar to those of *King v. Welcome*, whether the action was brought before or after the expiration of the agreed time of service. In *Philbrook v. Belknap*, *supra*, it was held, that if a party agree to serve another by an entire contract for three years for a stated compensation, and having served for six months only, then voluntarily leaves the service without any fault on the part of the employer, he cannot recover *pro rata* for his services, but the employer may protect himself under the terms of the contract. So, in *Shaw v. Shaw*, *supra*, it appeared that a party had rendered service, in consideration and in part performance of an oral contract for the purchase of land; it was held, that he could not avoid this contract and recover for his services while the other party was able and willing to fulfil it on his part. In *Foote v. Emer-*

proved, by evidence that the plaintiff was only prevented from serving during the period in question, by visitation of God, *e. g.* by sickness. (*l*) And, in like manner, where an action was brought on an apprenticeship deed for the breach of an absolute covenant therein contained, to serve the plaintiff for a certain term; it was held to be a good bar to such action that, during the time of the alleged breach, the service had been prevented by the act of God, *viz.* by the illness of the apprentice. (*m*)

It is quite clear, that a master need not, at the time of dismissing a servant, allege any specific act of misconduct on the part of the latter as the cause of such dismissal; it being sufficient if such a cause existed, in fact, at the time. (*n*) But it appears to be doubtful whether, in all cases in which a master is sued for the wrongful dismissal of a servant, and by his pleading justifies the dismissal of the latter for a particular cause, he must show — not only that at the time of the dismissal the alleged cause existed, — but also that he, the master, then knew of it; or whether this is necessary, only where the

Master need not allege any specific cause of dismissal.

son, *supra*, goods had been delivered in part fulfilment of a contract inoperative under the statute of frauds; it was held, that the party delivering them could not himself repudiate the contract and recover for the value of the goods. In *Philbrook v. Belknap*, *supra*, Phelps J. said: "In this case, the contract, so far as the service has been performed, is executed, and is relied on as regulating and determining the right of the plaintiff to compensation for what has been done under it, we are here concerned only with what has been done. The question is, what is the plaintiff entitled to for his labor; and this depends upon the terms of the contract, under which he performed the service. Had the whole service been performed, the rate of compensation would, without doubt, be regulated by the terms of the contract. No court would discard that contract, and resort to a *quantum meruit*. The principle is the same as to a performance in part. The defendant may be without remedy for the desertion of the plaintiff, but he may certainly protect himself as to what has been done. Any other rule would be pro-

ductive of monstrous mischief, and make the statute an instrument of fraud." See *Mack v. Bragg*, 30 Vt. 571. In *Shute v. Dorr*, 5 Wendell, 204, it appeared that there was a special contract for labor, void under the statute of frauds, and the laborer was allowed to recover on a *quantum meruit* for services actually rendered under it, without any reference to the special agreement. The contract had, however, been in fact abandoned by the mutual agreement of the parties. So, in *King v. Brown*, 2 Hill (N. Y.), 485, the plaintiff had performed services for land under an oral contract, and the defendant had put it out of his power to convey; a claim upon a *quantum meruit* for the services was sustained.]

(*l*) *Cukson v. Stones*, 1 E. & E. 248.

(*m*) *Boast v. Firth*, L. R. 4 C. P. 1.

(*n*) *Mercer v. Whall*, 5 Q. B. 447, 466; *Ridgway v. Hungerford Market Company*, 3 A. & E. 171; *Cussons v. Skinner*, 11 M. & W. 161. [See *Durgin v. Baker*, 32 Maine, 273; *Morrell v. Burns*, 4 Denio, 121.]

master has, by his mode of pleading, embodied the fact of such knowledge with the cause of the dismissal. (*o*)

In declaring against a master for the wrongful dismissal of his servant, it is sufficient to allege that the plaintiff "was ready and willing" to continue in the service; and the averment that he "offered" so to continue is immaterial. (*p*)

Declaration for wrongful dismissal.

Where wages are payable quarterly, or at some other stated period, and the servant is tortiously discharged during the currency of such period, he may recover at once for the time he has actually served, on the general count for work and labor. (*q*) But he cannot recover his whole wages in this form of action, — at all events, until after the time at which, by the contract, they would have accrued due. (*r*) And it has been doubted whether he can recover them, on the common count, even then. (*s*)

Form of action by servant, and damages recoverable.

Where a servant who is dismissed in the middle of a quarter, brings an action, and declares specially for the wrongful dismissal, the jury ought to be directed, in assessing the damages for such wrongful dismissal, to take into account the plaintiff's salary up to the time of his dismissal; and he cannot afterwards sue, on the common count, to recover a compensation for his actual service. (*t*)

So if it appear that, after his dismissal, the servant might have obtained other equally eligible employment, the jury may be directed, that a small amount will indemnify him for his loss by the master's breach of contract. (*t*¹) But if the circumstances be re-

(*o*) *Ib.*; and see *Spotswood v. Barrow*, 5 Exch. 110.

(*p*) *Wallis v. Warren*, 4 Exch. 361; 18 L. J. Exch. 449.

(*q*) See 2 Smith L. C. 20.

(*r*) *Smith v. Hayward*, 7 A. & E. 544; *Broxam v. Wagstaffe*, 5 Jur. 845; *Fewings v. Tisdal*, 1 Exch. 295; recognizing *Archard v. Horner*, 3 C. & P. 349. And it would seem that the cases of *Gandell v. Pontigny*, 1 Stark. 198; *S. C.* 4 Camp. 375, and *Collins v. Price*, 5 Bing. 132, cannot now be relied on.

(*s*) Per Patteson and Erle JJ. *Goodman v. Pocock*, 15 Q. B. 576, 581, 583, and per Crompton J. *Emmens v. Elderton* (in Dom. Proc.), 13 C. B. 495, 507. [See

Derby v. Johnson, 21 Vt. 17; *Webster v. Enfield*, 5 Gilman, 298; *Hall v. Rupley*, 10 Barr, 231; *Moulton v. Trask*, 9 Met. 577; *Clark v. Marsiglia*, 1 Denio, 317.]

(*t*) *Ib.*

(*t*¹) [The master may show, for the purpose of reducing the damages, that, after the party employed had been dismissed, he had engaged in other business; or that employment of the same general nature, as that from which he had been dismissed, had been tendered to him, which he refused; but not a different kind of employment, or business to be conducted at another place. The opportunity to be so employed will not, however, be presumed; but must be affirmatively shown by the

versed, then his loss from the breach of contract may be such that the damages may exceed the salary. (*u*)

Again: where the special count is for dismissing the servant without giving him a month's warning, or paying a month's wages, the servant cannot recover more than a month's wages, as damages for the wrongful dismissal; and if there be any further arrear of wages due, he must sue for them under the common count. (*v*)

It seems that where a domestic servant has left his master for a considerable period, it will, in general, be presumed that his wages have been paid. (*x*) And the same presumption arises in the case of workmen or laborers on proof that it was customary for the employer to pay his men at stated periods, *e. g.* weekly. (*y*)

If the servant were under age, the master cannot deduct from or set off against his wages, any sums advanced or paid by him to or for the servant, for articles which were not necessary for the latter. (*z*)

employer. Beardsley J. in *Costigan v. Mohawk & Hud. R. R. Co.* 2 Denio, 609; *Jones v. Jones*, 2 Swan (Tenn.), 605; *Pond v. Wyman*, 15 Missou. 175; *Shannon v. Comstock*, 21 Wend. 459. See *ante*, 844, note (*d*³). In *Jones v. Jones*, *ubi supra*, it was said by Totten J. as illustrative of the justice and equity of the above rule: "A mason is engaged to work for a month, and tenders himself, and offers to perform; but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month, clearly his loss is but one day; and it is his duty to seek other employment. Idleness is itself a breach of moral obligation. But, if he continue idle for the purpose of charging another, he superadds a fraud, which the law had rather punish than countenance." This proceeds upon the principle, that, if the party entitled to the benefit of a contract, can protect himself from a loss arising from the breach thereof, at a trifling expense, or with reasonable exertions, it is his duty to do it. And he can charge the delinquent party with such damages only as, with reasonable endeavors and expense, he could not prevent. *Miller v. Mariners' Church*, 7

Greenl. 51. See *Miller v. Goddard*, 34 Maine, 102, 107.]

(*u*) Per Crompton and Erle JJ. *Emmens v. Elderton* (in Dom. Proc.), 13 C. B. 495, 508, 519.

(*v*) *Hartley v. Harman*, 11 A. & E. 798.

(*x*) *Sellen v. Norman*, 4 C. & P. 80. [But it is no evidence of payment for one servant's labor that other laborers employed by the party, on the same work, at the same time, had been regularly paid. *Filer v. Peebles*, 8 N. H. 226.]

(*y*) *Lucas v. Novisilieski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 81, note (*a*).

(*z*) *Hedgley v. Holt*, 4 C. & P. 104. [See *Stone v. Dennison*, 14 Pick. 1; *Adams v. Woonsocket Co.* 11 Met. 327. A minor, who has entered into a special contract for service, may avoid his special agreement even when only partially executed, and recover a reasonable compensation for the services actually performed by him, as if no such agreement had existed. See *ante*, 200, note (*o*), and cases to this point cited. In some cases, it has been held, that, in such case, there should be a deduction made for any damage to his employer by such violation of the contract.

A master is bound to provide medical attendance and medicine for his apprentice; (*a*) but not for his servant in husbandry, (*b*) or for his menial servant, (*c*) even though the illness of the servant arise from an accident, which occurred whilst he was performing the duties of his situation. But if a master send for a medical practitioner for his servant, whilst under his roof, he is liable; and he cannot deduct from the servant's wages the expense occasioned thereby, unless it was specially so agreed. (*d*)

Duty of master as to providing medical attendance for servant.

Nor is the master, in general, liable in damages to his servant, for an injury sustained by the latter, whilst employed and acting in his master's business. (*e*)

Master not in general liable to servant for injuries sustained in his employ.

But it is the master's duty to be careful that his servant is not induced to work, under a notion that tackle or machinery is stanch and secure, when in fact the

Thomas *v.* Dike, 11 Vt. 273; Moses *v.* Stevens, 2 Pick. 332; Judkins *v.* Walker, 17 Maine, 38. But this was denied in Whitmarsh *v.* Hall, 3 Denio, 375, where it was held, that the minor should recover in the same manner as he would if there had been no contract at all. And this would seem to result from the reasoning of Putnam J. in Vent *v.* Osgood, 19 Pick. 572, 575, cited *ante*, 200, in note (*o*). See Moulton *v.* Trask, 9 Met. 577; Laton *v.* King, 19 N. H. 280. But where the plaintiff's claim was for the services of his minor son, under a contract made by the minor with the defendant, it was held, that the plaintiff is so far bound by the contract of his son, that his claim depends upon a proper performance of the contract, and that he would not be entitled to recover therefor, in violation of the contract so made. Rogers *v.* Steele, 24 Vt. 513.]

(*a*) Reg. *v.* Smith, 8 C. & P. 153.

(*b*) See Newby *v.* Wiltshire, 2 Esp. 739; Wennall *v.* Adney, 3 B. & P. 247; Watling *v.* Waters, 1 C. & P. 132.

(*c*) See Reg. *v.* Smith, 8 C. & P. 153; Sellen *v.* Norman, 4 C. & P. 80; Cooper *v.* Phillips, *Ib.* 581; Scarman *v.* Castell, 1 Esp. 270. [No action lies by a physician for medicines administered to, and attendance upon a slave, without the knowledge

or request of the master, in a case not requiring instant and immediate assistance. Dunbar *v.* Williams, 10 John. 249.]

(*d*) Sellen *v.* Norman, 4 C. & P. 80.

(*e*) Hutchinson *v.* York, Newcastle & Berwick Railway Co. 5 Exch. 343; Wigmore *v.* Jay, *Ib.* 354; Priestly *v.* Fowler, 3 M. & W. 1; and see Abraham *v.* Reynolds, 5 H. & N. 143; Seymour *v.* Maddox, 16 Q. B. 326; Skip *v.* Eastern Counties Railway Co. 9 Exch. 223; Couch *v.* Steel, 3 E. & B. 402; Tunney *v.* Midland Railway Co. L. R. 1 C. P. 291. The same rule applies to the case of a person who volunteers to assist a servant in his work. Degg *v.* Midland Railway Co. 1 H. & N. 773; Potter *v.* Faulkner, 1 B. & S. 800. [Where the master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service. Farwell *v.* Boston & Worcester R. R. 4 Met. 49. The same principle was again acted upon in Hayes *v.* Western R. R. 3 Cush. 270; Brown *v.* Maxwell, 6 Hill (N. Y.), 594; Carle *v.* Bangor & Piscataquis Canal & R. R. Co. 43 Maine, 269; Cook *v.* Parham, 24 Ala. 21; Albro *v.*

master knows or ought to know that it is not so. (*e*¹) And if, from any negligence in this respect, damage arise, the master is responsible. (*f*) And so, although an action does not lie against the master for the consequences to a servant of the mere negligence of his fellow-servant; (*g*) still the master may be responsible, if it appear

Agawam Canal Co. 6 Cush. 75; Honner v. Illinois Central R. R. Co. 15 Ill. 550; Coon v. Syracuse & Utica R. R. Co. 6 Barb. 231; Shields v. Yonge, 15 Geo. 349; Ryan v. Cumberland Valley R. R. Co. 23 Penn. St. 384; Gillshannon v. Stony Brook R. R. Co. 10 Cush. 228; Boldt v. N. Y. Central R. R. Co. 4 Smith (N. Y.), 432; Morgan v. Vale of Neath Railway Co. 5 B. & S. 736; Devitt v. Pacific R. R. Co. (Missouri) 12 Am. Law Reg. N. S. 104. Though they may be engaged on totally different kinds of work. Albro v. Agawam Canal Co. 6 Cush. 75; Gillshannon v. Stony Brook R. R. Co. *supra*. But see Russell v. Hudson River R. R. Co. 5 Duer (N. Y.), 39; S. C. 17 N. Y. 134; Morgan v. Vale of Neath Railway Co. 5 B. & S. 736. And the fact that the servant injured is a minor, does not at all affect his legal rights in this particular. King v. Boston & Worcester R. R. Co. 9 Cush. 112. The obligations of the employer, towards those in his employment, does not extend beyond the use of ordinary care and diligence. King v. Boston & Worcester R. R. Co. *supra*; Ryan v. Cumberland Valley R. R. Co. 23 Penn. St. 384; Marshall v. Stewart, 33 Eng. Law & Eq. 1; Tarrant v. Webb, 18 C. B. 797; Sherman v. Railroad Co. 15 Barb. 574; Walker v. Bolling, 22 Ala. 294. One servant is not liable to an action by another servant in the employment of the same master, for damages occasioned by the negligence of the first in such employment. Albro v. Jaquith, 4 Gray, 99; Winterbottom v. Wright, 10 M. & W. 115.]

(*e*¹) [See Burrell v. Laconia Manuf. Co. 48 Maine, 113; Anderson v. New Jersey & Co. 7 Rob. (N. Y.) 611.]

(*f*) Per Lord Cranworth, Paterson v. Wallace, 1 Macq. H. L. Ca. 748, 751; and see Roberts v. Smith, 2 H. & N. 213; Wil-

liams v. Clough, 3 Ib. 258; Griffiths v. Gidlow, Ib. 648; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Senior v. Ward, 1 E. & E. 385; Ormond v. Holland, 1 E., B. & E. 102; Holmes v. Clarke, 6 H. & N. 349; Ashworth v. Stanwix, 30 L. J. Q. B. 183; Mellors v. Shaw, 1 B. & S. 437; [Burrell v. Laconia Manuf. Co. 48 Maine, 113, a well considered case; Indianapolis R. R. Co. v. Love, 10 Ind. 554; Keegan v. Western R. R. Co. 4 Selden, 175; Mad River & Erie R. R. Co. v. Barber, 5 Ohio (N. S.), 541; McGatrick v. Mason, 4 Ohio (N. S.), 566; Hayden v. Smithville Manuf. Co. 29 Conn. 548; Fifield v. Northern R. R. 42 N. H. 225; Byron v. N. Y. Telegraph Co. 26 Barb. 39; Wright v. New York & C. R. R. Co. 25 N. Y. 562; Felch v. Allen, 98 Mass. 572, 574; Snow v. Housatonic R. R. Co. 8 Allen, 441; Stewart v. Harvard College, 12 Allen, 58; Flynn v. Beebe, 98 Mass. 575; Warner v. Erie R. R. Co. 39 N. Y. 468; Shanck v. Northern & C. R. R. Co. 25 Md. 462. But if the servant, well knowing the default of his principal, as in providing defective machinery, voluntarily enters upon, or continues in his employment, he assumes the risk, and, if injured, has no remedy against his employer. Burrell v. Laconia Manuf. Co. 48 Maine, 113; Hayden v. Smithville Manuf. Co. 29 Conn. 548; Dynen v. Leach, 26 Law Jur. 221; Devitt v. Pacific R. R. Co. (Missouri) 12 Am. Law Rev. (N. S.) 104; Chicago & C. R. R. Co. v. Swett, 45 Ill. 197.]

(*g*) Waller v. South Eastern Railway Co. 2 H. & C. 102; Lovegrove v. London, Brighton & South Coast Railway Co. 16 C. B. N. S. 669; Gallagher v. Piper, Ib. As to who are fellow-servants within this rule, see Hall v. Johnson, 3 H. & C. 589; Morgan v. Vale of Neath Railway Co. 5 B. & S. 570; S. C. (in Cam. Scac.) Ib. 736; Feltham v. England, L. R. 2 Q. B.

that he was guilty of negligence in employing the person by whose act the mischief was caused. (*h*)

And the liability of the master in these cases rests upon *duty* only. For, in an ordinary contract of hiring and service there is no *implied agreement* by the master, not to expose the servant to extraordinary risks in the course of his employment. (*i*)

Nor can the master sue a third party for an injury caused by him to his servant, by breach of a contract made between such third party and the servant. (*k*)

Master cannot sue third party for injury done to servant.

[It may be suitable here to introduce the subject of the *liability of a master for the acts of his servant*. The word servant has, both in the English and American law, a more extended signification than that which has been attributed to it, in the treatment of this subject thus far. And it may be added that in the American states the relation of master and servant is governed by the same rules of law as other contracts for service or labor.

Liability of master for the acts of his servant.

One is of course to be considered and treated as the legal servant of another when he is in fact hired, employed, and controlled as such. But one may also be legally the servant of another in whose business, and under whose order, direction, and control, he is acting for the time being, although no general relation of master and servant in fact exists between them.

Many of the rules of responsibility, applicable to the relation of master and servant in this enlarged sense, have been already stated in treating the subject of agency. There are others still to be considered.

The relation being shown to exist in one or the other of the above senses, the master is then held liable for the servant's acts, doings, and defaults, and the consequences thereof, so far as the servant is pursuing his employment, and is acting within the fair scope of his order, direction, and authority. (*k*¹)

33; Warburton *v.* Great Western Railway Co. L. R. 2 Ex. 30; [Rohback *v.* Pacific R. R. Co. 43 Missou. 187; Louisville & C. R. R. Co. *v.* Robinson, 4 Bush (Ky.), 507; Wright *v.* New York & C. R. R. Co. 25 N. Y. 562; Felch *v.* Allen, 98 Mass. 572; Shank *v.* Northern & C. R. R. Co. 25 Md. 462; Conlin *v.* Charleston, 15 Rich. (S. Car.) L. 201.]

11 Exch. 832, 839; Tarrant *v.* Webb, 18 C. B. 797; per Cur. Potter *v.* Faulkner, 1 B. & S. 800, 806; Searle *v.* Lindsay, 11 C. B. N. S. 429. [See Russell *v.* Hudson River R. R. Co. 5 Duer (N. Y.), 39; Illinois & C. R. R. Co. *v.* Jewell, 46 Ill. 99.]

(*i*) Riley *v.* Baxendale, 6 H. & N. 445.
(*k*) Alton *v.* Midland Railway Co. 19 C. B. N. S. 213.

(*h*) Wilson *v.* Merry (in Dom. Proc.), L. R. 1 Scotch Ap. 326; Wiggett *v.* Fox, 11 Exch. 832, 839; Tarrant *v.* Webb, 18 C. B. 797; per Cur. Potter *v.* Faulkner, 1 B. & S. 800, 806; Searle *v.* Lindsay, 11 C. B. N. S. 429. [See Russell *v.* Hudson River R. R. Co. 5 Duer (N. Y.), 39; Illinois & C. R. R. Co. *v.* Jewell, 46 Ill. 99.]

(*k*¹) [Earle *v.* Hall, 2 Met. 343, 357; Stone *v.* Codman, 15 Pick. 297; Parke B

It is, therefore, a point of the first importance, and often one of much nicety, to ascertain, whether, in a given case, this relation may be regarded as subsisting (k^2); but, when this is ascertained, the application of the rule of liability above stated is readily made.

in *Quarnam v. Burnett*, 6 M. & W. 499; *Jones v. Hart*, 2 Salk. 441; *Martin v. Temperley*, 4 Ad. & El. (N. S.) 298; *Story Agency*, §§ 452, 453; *Middleton v. Fowler*, 1 Salk. 282; *Patten v. Rea*, 2 C. B. N. S. 606; *Morgan v. Bowman*, 22 Mis. (1 Jones) 538; *Carman v. Steub.* & *Ind. R. R. Co.* 4 Ohio (N. S.), 399. In all the cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury. *Dunlap's Paley's Agency* [306]; *Wolfe v. Mersereau*, 4 Duer (N. Y.), 473.]

(k^2) [In *Milligan v. Wedge*, 12 Ad. & El. 737, Mr. Justice Williams said: "The difficulty always is, to say whose servant the person is who does the injury; when you decide that, the question is solved." *Stone v. Codman*, 15 Pick. 299, per Shaw C. J.; *Quarnam v. Burnett*, 6 M. & W. 499; *Moore v. Sanborne*, 2 Mich. (Gibbs) 519; *Sproul v. Hemmingway*, 14 Pick. 1; *Patten v. Rea*, 2 C. B. N. S. 606; *Linton v. Smith*, 8 Gray, 147. "The relation of master and servant cannot be created but by contract express or implied between the master and servant." *Jewett J. in Stevens v. Armstrong*, 3 Selden, 435, 442. In *Martin v. Temperley*, 4 Ad. & El. (N. S.) 298, 312, it was decided, that where the owner of a barge on the Thames hires qualified persons to navigate it, none but qualified persons being allowed to navigate within certain limits, such owner is liable for any injury caused by their negligent management of the barge. In this case, Coleridge J. said: "The question is, were the defendant and the persons employed by him master and servants? If they were, the general principle applies. And the test leaves no doubt that they were. First, the men were selected by the defendant; secondly, they were paid by him; thirdly, they

were doing his work; fourthly, they were under his control; that is, in doing the work in the ordinary way. It is said, that a difference arises where the workman is paid so much for doing the whole job. But the defendant might pay either for a given time or a given work. Here the defendant had the control over the persons navigating the barge, subject to the rules of the river. They are practically selected by him." The authority of a master of a vessel is superseded by that of a pilot; the master is not, therefore, liable for damage caused by the acts of the pilot; but the owner is liable; *Yates v. Brown*, 8 Pick. 23; except where, as in England, he is exempted by statute. Where A. & S. sold to P. a box which was in the loft of their store, and P. promised to send his porter to take it away, and did so, and the porter, with the knowledge and permission of A. & S., proceeded to the loft to get the box down, and in doing so (using the tackle and fall of A. & S. for that purpose, which was suspended on the outside of the store), through negligence suffered the box to fall, by which the plaintiff, passing on the sidewalk in front of the store, was injured; it was held, that, in letting down the box, the porter acted as the servant of P., and not of A. & S., and that the latter were not answerable for his negligence. *Stevens v. Armstrong*, 3 Selden, 435. A., the general manager of the defendant, the proprietor of a horse repository, was possessed of a horse and gig, which were kept for him upon the defendant's premises, free of charge, and were used by A. in the conduct of the defendant's business. In going (with the knowledge of the defendant) upon the defendant's business, with the horse and gig, A. drove against and killed the plaintiff's horse; held, that the defendant was responsible, and that it was immaterial that A. was *also* going on pri-

Some cases have gone so far even as to hold an employer responsible for the negligence and misconduct of a contractor and the subordinate agents and servants of a contractor, who has been employed to do a specific job of work under a contract for the whole at an agreed price. (*k*³)

But these cases are now quite generally regarded by the best authorities as pressing the liability beyond reasonable bounds. And the better opinion seems to be, that, ^{General rule.} where a contract or retainer for labor and service is one that the parties have a right to make (*k*⁴) is in reference to a business in-

vate business of his own. *Patten v. Rea*, 2 C. B. N. S. 606. See *Wolfe v. Merse-reau*, 4 Duer (N. Y.), 473; *Pickard v. Smith*, 10 C. B. N. S. 470. Where one volunteers to assist another in a piece of work, the latter being present, they will stand in the relation of master and servant, and the former will be liable for a trespass committed by the latter, through negligence or want of information. *Hill v. Morey*, 26 Vt. 178.]

(*k*³) [Thus in *Bush v. Steinman*, 1 Bos. & Pul. 404, A. contracted with B. to repair a house, and B. contracted with C. to do the work, and C. contracted with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned; A. was held to be answerable for the damage, on the ground that all the sub-contracting parties were in the employment of A. The doctrine of the case of *Bush v. Steinman* was approved and adopted in New Hampshire, after full consideration of all the cases since decided, in *Stone v. Cheshire R. R. Corp.* 19 N. H. 427 (1849). In *Lowell v. Boston & Lowell R. R. Corp.* 23 Pick. 31, Mr. Justice Wilde, having cited and stated the case of *Bush v. Steinman*, said: "This decision is fully supported by the authorities cited, and by well established principles." The same doctrine was acted on, to some extent, in *Stone v. Codman*, 15 Pick. 297. But in *Earle v. Hall*, 2 Met. 353, the court gave it only a cautious recognition. Full assent seems to have been given to it by

Walworth Chancellor, and *Hand Senator*, in *New York v. Bailey*, 2 Denio, 433. See *McCleary v. Kent*, 3 Duer (N. Y.), 27; *Story Agency*, § 454; *Sly v. Edgely*, 6 Esp. 6; *Littledale v. Lonsdale*, 2 H. Bl. 267; *Stone v. Cartwright*, 6 T. R. 411; *Matthews v. West London Water Works*, 3 Camp. 403; *Randleson v. Murray*, 8 Ad. & El. 109; *Sadler v. Henlock*, 4 El. & Bl. 570; *Leslie v. Pounds*, 4 Taunt. 649; *Bailey v. New York*, 3 Hill, 531; *Leshner v. Wabash Nav. Co.* 14 Ill. 85; *Wiswall v. Brinson*, 10 Ired. 554; *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155; *Linton v. Smith*, 8 Gray, 147; *Buncan v. Findlater*, 6 Cl. & Fin. (Am. ed.) 894, 903, note (1). But in *Hilliard v. Richardson*, 3 Gray, 349, the doctrine of *Bush v. Steinman* was entirely repudiated.]

(*k*⁴) [Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons, who sustain damage from the doing of that wrong. *Ellis v. The Sheffield Gas Consumers Co.* 2 El. & Bl. 767. Lord Campbell C. J. said: "I am clearly of opinion, that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. The defendants employ a contractor to do that which was unlawful, and an act done in consequence of such employment is the

volving no peculiar relation of duty towards the public ; (*k*⁵) and is of such a character as to leave the person employed free to follow the direction of his own judgment and discretion, and to act as his own man, injuries caused to third persons by his negligence or misconduct, or by the negligence or misconduct of his workmen, agents, and servants, in the course of the employment, impose no responsibility upon a master or employer, who has in other respects no efficient control or supervision over the person employed or those acting under him, (*k*⁶) and who has given no other direction or

cause of the injury for which the action is brought. It would be monstrous, if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." See, also, per Cresswell J. in *Overton v. Freeman*, 11 C. B. 867, 874.]

(*k*⁵) [See *Lowell v. Boston & Lowell R. R. Co.* 23 Pick. 24 ; *Hilliard v. Richardson*, 3 Gray, 353, 364, 366, 367, where Thomas J. assumes the ground "that where persons are invested by law with authority to execute a work, involving ordinarily the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted." *Bailey v. New York*, 3 Hill, 351 ; *S. C.* 2 Denio, 433 ; *Leshner v. Wabash Navigation Co.* 14 Ill. 85 ; *Matthews v. West London Water Works Co.* 3 Camp. 403. In *Stone v. Cheshire R. R. Corp.* 19 N. H. 427, it appeared that the defendants made a contract with certain persons, that the latter should build a certain portion of their railroad, and while the contractor was at work upon the road in pursuance of the contract, some rocks were blasted, and a stone was thrown upon the plaintiff, causing him serious injury. It was held, that the plaintiff might maintain an action against the defendants to recover for the injury. This doctrine is not supported by the late English decisions. They hold that where work is done

under a contract (parol or otherwise) for a railway company, empowered by act of parliament to construct a railway, the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, even though they employ their own surveyor to superintend it, and direct what shall be done ; *Steel v. The South Eastern Railway Co.* 16 C. B. 550 ; and reserve the power to dismiss any of the contractor's workmen for incompetence. *Reedie v. London & North Western Railway Co.* 4 Exch. 244.]

(*k*⁶) [One cannot be held liable for the acts of another as his servant in any business, unless he has some degree of control over him in regard to the manner of transacting it. This seems to be regarded as the most important test. *Kelly v. New York*, 1 Kernan, 432 ; *Pack v. New York*, 4 Selden, 222 ; *Mullett J. in Blake v. Ferris*, 1 Selden, 48, 54 ; *Coleridge J. in Martin v. Temperley*, 4 Ad. & El. (N. S.) 298, 312 ; *Crompton J. in Sadler v. Henlock*, 4 El. & Bl. 570, 578 ; *Williams J. in Milligan v. Wedge*, 12 Ad. & El. 737 ; *Pawlet v. Rutland & Wash. R. R. Co.* 28 Vt. 297 ; *Burke v. Norwich &c. R. R. Co.* 34 Conn. 474 ; *Allen v. Willard*, 57 Penn. St. 374 ; *Conlin v. Charleston*, 15 Rich. (S. Car.) 201 ; *Schwartz v. Gilmore*, 45 Ill. 455. The same principle is applicable to injuries done by animals in the custody and control of a bailee, the bailee, and not the owner, is liable to answer for the damages. *Rossell v. Cottom*, 31 Penn. St. 525 ; 1 Esp. N. P. 387 ; *Dawtry v. Huggins*, Clayton, 33.]

sanction (*k*⁷) to their acts, than would be implied from the fact of his being the employing party in such contract or retainer. (*k*⁸)

(*k*⁷) [See *Burgess v. Gray*, 1 Man., Gr. & S. 578, per Cresswell J.]

(*k*⁸) [Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer at so much per barrel, and while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk, the employer was held not to be liable for the injury. *De Forrest v. Wright*, 2 Mich. (Gibbs) 368. The purchaser of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different persons) to the owner's slaughterhouse. Damage was done by the bullock through the careless driving of the boy. The owner was held not to be liable for the injury, the boy not being in point of law his servant. *Milligan v. Wedge*, 12 Ad. & El. 737. Coleridge J. said: "I make no distinction between the licensed drover and the boy; suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge; and then the drover does the act. The relation, therefore, of master and servant does not exist between them." It seems to have been considered in these cases that where the person employed exercised a distinct and independent calling, the employer is not liable for his negligence. So also in *Allen v. Hayward*, 7 Ad. & El. (N. S.) 960, 975; *Rapson v. Cubitt*, 9 M. & W. 710; *Wightman J. in Sadler v. Henlock*, 4 El. & Bl. 578; *Littledale J. in Laughner v. Pointer*, 5 B. & C. 547. If the damage be caused by negligence in the performance of work by *the job*, or under *special contract*, it has been held that the contractor alone is responsible. *Allen v. Hayward*, 7 Q. B. 960; *Clark v. Vt. &*

Canada R. R. Co. 28 Vt. 103; *Pawlet v. Rutland & Wash. R. R. Co.* 28 Vt. 297. And it makes no difference if the contractor is in other respects, aside from the contract, the servant of the other party. *Knight v. Fox*, 5 Exch. 721. In some cases, it has been assumed, in deference to *Bush v. Steinman*, cited *supra*, that the owner of real estate, who contracts with others to erect or repair buildings, or do other acts upon it, is more peculiarly liable for the negligence or misconduct of those, or the servants and agents of those with whom he contracts, than would be the owner of personal property, who should enter into a similar contract in reference to that. *Abbott C. J. and Littledale J. in Laughner v. Pointer*, 5 B. & C. 547; *Shaw C. J. in Earle v. Hall*, 2 Met. 357-360, and in *Sproul v. Hemmingway*, 14 Pick. 4; *Rich v. Basterfield*, 4 Man., Gr. & S. 800-802, per Cresswell J.; *New York v. Bailey*, 2 Denio, 433; *Pawlet v. Rutland & Wash. R. R. Co.* 28 Vt. 297. In *Quarnam v. Burnett*, 6 M. & W. 499, 510, it is held, that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and this whether his property be managed by his own immediate servants, or by contractors or their servants. But in *Milligan v. Wedge*, 12 Ad. & El. 737, Lord Denman C. J. said: "If I felt any doubt, it would be whether the distinction as to the law in the cases of fixed and of movable property can be relied upon." The case of *Allen v. Hayward*, 7 Ad. & El. (N. S.) 960, called for a notice of this distinction, if it existed, from the same learned judge, but it received none. And in *Reedie v. The London & N. W. Railway Co.* 4 Exch. 244, Rolfe Baron (now Lord Chancellor Cranworth) said: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance." "If a person occupying a

The *immediate* employer of the servant, through whose negligence an injury occurs, is the person responsible for it. To him the principle *respondeat superior* applies; and there cannot be two *superiors severally* responsible in such cases at the same time, and in the same transaction. (*k*⁹)

Immediate employer responsible.

If a person hires a carriage and horses of a stable keeper for a journey, or if, having a carriage of his own he merely hires of the

house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, *sic utere tuo ut alienum non ledas*." The responsibility of the owner of land for a nuisance on it, arises only when he has in some way contributed to the creation or continuance of it, or, at least, *sanctioned* it. Per Cresswell J. in *Burgess v. Gray*, 1 Man., Gr. & S. 578. See, also, *Rich v. Basterfield*, 4 Man., Gr. & S. 783; *Leslie v. Pounds*, 4 Taunt. 649; *Fish v. Dodge*, 4 Denio, 311. In *Peachy v. Rowland*, 13 C. B. 182, the defendants employed B. to construct a drain in a public highway; B. employed C. to fill in the earth over the brick work, and to carry away the surplus; C. in performing his work, left the earth raised so much above the level of the road, that the plaintiff, driving by in the dark, was thereby upset and sustained injury. One of the defendants, being a witness, admitted that a few days before the accident he was upon the spot, and saw the improper manner in which C. was doing the work. It was held, that there was no evidence to warrant a verdict holding the defendants responsible. Most of the important decisions upon the general subject were examined in *Hilliard v. Richardson*, 3 Gray, 349, and upon full consideration it was held, that the owner of land, who employs a carpenter for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land, by a teamster in the

employ of the carpenter, and intended to be used in such alteration and repair. This case entirely repudiates the authority of *Bush v. Steinman*. See *Blake v. Ferris*, 1 Selden, 48; *Stevens v. Armstrong*, 2 Selden, 435; *Gilbert v. Beach*, 4 Duer (N. Y.), 423. A town or city which has ordered a street to be graded, and has contracted with a person to do the grading, is not liable for damage caused by the negligence of the workmen employed by the contractor in performing the work, although the contract provides that the work shall be done under the direction, and to the satisfaction of certain officers of the city or town. *Kelly v. New York*, 1 Ker. 432; *Pack v. New York*, 4 Selden, 222. In *Reedie v. London & North Western Railway Co.* 4 Ex. 244, a company empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence; the workmen in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him; and it was held, in an action against the company by the administratrix of the deceased, that they were not liable; and that, in such case, the terms of the contract in question did not make any difference. See, also, *Knight v. Tax*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867; *Rapson v. Cubitt*, 9 M. & W. 710; *Allen v. Hayward*, 7 Ad. & El. (N. S.) 960; *Steel v. S. E. Railway Co.* 16 C. B. 550.]

(*k*⁹) [*Blake v. Ferris*, 1 Selden, 48; *Littdale J. in Laughner v. Pointer*, 5 B. & C. 559.]

stable keeper horses to draw it, and in each case the owner of the horses provides a driver, who has the care and management of them, the driver is the servant of the owner of the horses, and such owner, and not the hirer of the horses, will be responsible for any injury done to third persons by the negligent driving of the driver. (*k¹⁰*)

Stable keeper who provides horses and driver.

Even where the relation of master and servant exists, the law will never hold the master responsible as a trespasser for injuries caused by the acts of his servant, unless the master expressly ordered or authorized the acts to be done, or the injuries were the necessary, natural, or probable result of acts which the servant was ordered or directed to do (*k¹¹*)

When master liable for trespasses of servant.

(*k¹⁰*) [*Laugher v. Pointer*, 5 B. & C. 547; *Sammell v. Wright*, 5 Esp. 263; *Dean v. Branthwaite*, 5 Esp. 35; *Quarnam v. Burnett*, 6 M. & W. 499; *Smith v. Lawrence*, 2 M. & Ry. 1; *Weyant v. New York & Harlem R. R.* 3 Duer (N. Y.), 360; *Blattenberger v. Schuykill*, 2 Miles, 309. It would make no difference if the person hiring the horses requested the services of a particular driver. In *Quarnam v. Burnett*, 6 M. & W. 508, it was said: "If the driver be the servant of the job-master, we do not think he ceases to be so, by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference." See *Holmes v. Onion*, 2 C. B. N. S. 790. But the hirer of the horses may render himself liable, if he directs the conduct of the driver, or shares in the act by which damage accrues. *M'Laughlin v. Pryor*, 4 M. & Gr. 48; *Chandler v. Broughton*, 3 Tyrw. 220; S. C. 1 Cr. & M. 29. In *Quarnam v. Burnett*, Baron Parke observed: "It is undoubtedly true that there may be special circumstances

which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." In *Brady v. Giles*, 1 M. & Rob. 494, Lord Abinger held it to be a question of fact for a jury whether the servant was acting as the servant of the party hiring, or of the owner.]

(*k¹¹*) [*Paley's Agency* (by Dunlap), [306]; *Freeman v. Roshern*, 13 Ad. & El. (N. S.) 780; *Yerger v. Warren*, 31 Penn. St. 319; *The Thames Steamboat Co. v. The Housatonic R. R. Co.* 24 Conn. 40, an important and well considered case; *Howe v. Newmarch*, 12 Allen, 49; *Gregory v. Piper*, 9 B. & C. 591; *Croft v. Alison*, 4 B. & Ald. 590; *Sleath v. Wilson*, 9 C. & P. 607; *Lamb v. Palk*, 9 C. & P. 629; *Parker J. in Sinclair v. Pearson*, 7 N. H. 221, 222; *Gordon v. Rolt*, 4 Exch. 365; *Story Bailm.* §§ 402, 403; *McCoy v. McKowen*, 26 Miss. (4 Cush.) 487; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480; 2 Comst. 479; *Church v. Mansfield*, 20 Conn. 284; *Wright v. Wilcox*, 19 Wend. 343; *Wilton v. Middlesex Railroad Co.* 107 Mass. 108, 110; *Ramsden v. Boston & Albany R. R. Co.* 104 Mass.

But the master will be liable as a trespasser for acts of trespass done by his express order, or which are the natural or necessary results of acts specially ordered by him, not, however, on the ground of any peculiar relationship of master and servant, but upon the ground that the acts were done by the master's command, and thus became in law his own acts. (*k*¹²)

So, the master will be liable to answer in any proper form of action, for injuries caused by the negligence or misconduct of his servant, done in pursuance, and within the scope, of the business intrusted to him, however contrary to the master's wishes such acts and negligence may have been. (*k*¹³)

When liable
for servant's
negligence,
&c.

117. If the master gives an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant, in executing the order, makes use of force in a manner and to a degree which is unjustifiable. *Hoar J. in Howe v. Newmarch*, 12 Allen, 56, 57.]

(*k*¹²) [*The Thames Steamboat Co. v. The Housatonic R. R. Co.* 24 Conn. 40; *Ramsden v. Boston & Albany R. R. Co.* 104 Mass. 117; *Howe v. Newmarch*, 12 Allen, 49; *Wilton v. Middlesex Railroad*, 107 Mass. 108, 110; *Story Agency*, § 455; per *Woodbury J. in Wilson v. Peverley*, 2 N. H. 549; *McManus v. Crickett*, 1 East, 106; per *Cresswell J. in M'Laughlin v. Pryor*, 4 Man. & Gr. 48, 61; *May v. Bliss*, 22 Vt. 477; *Yerger v. Warren*, 31 Penn. St. 319; *Morley v. Gainsford*, 2 H. Bl. 442. A master ordered his servant to lay down some rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall; it was held, that the master was liable in trespass. *Gregory v. Piper*, 9 B. & C. 591; *Lonsdale v. Littledale*, 2 H. Bl. 267, 299. See *Sharrod v. London & North Western Railway Co.*; *Gordon v. Rolt*, 4 Exch. 365. A party, consisting of the defendant and others, hired a carriage and post-horses for a day's excursion. The horses were driven by postilions, who

were the servants of the owner of the horses. The postilions in endeavoring to force their way into a line of carriages, overturned a gig and seriously injured the plaintiff, who was in the gig. The defendant was riding on the box of the carriage when the accident occurred, and saw what was going on, and must have known the object of the post-boys in doing what they did. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened. It was held that he was liable in trespass. *McLaughlin v. Pryor*, 4 M. & Gr. 48. See *Chandler v. Broughton*, 3 Tyrw. 220; S. C. 1 Cr. & M. 20.]

(*k*¹³) [*Southwick v. Estes*, 7 Cush. 385; *Howe v. Newmarch*, 12 Allen, 49; *Phil. & Read. R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Croft v. Alison*, 4 B. & Ald. 590; *Slcath v. Wilson*, 9 C. & P. 607; *Wilson v. Peverley*, 2 N. H. 549, 550; *Story Bailm.* § 402; *Story Agency*, §§ 452, 453; 3 Kent, 259; *Duggins v. Watson*, 15 Ark. 118; *Priester v. Augley*, 5 Rich. 44; *Walker v. Bolling*, 22 Ala. 294; *Douglass v. Stephens*, 18 Misou. 362; *Lamb v. Palk*, 9 C. & P. 629; *Joel v. Morrison*, 6 C. & P. 501; *Johnson v. Barber*, 5 Gil. 425; *Wiswall v. Brinson*, 10 Ired. 554; *Coleman v. Riches*, 16 C. B. 104; *Patten v. Rea*, 2 C. B. N. S. 606; *Luttrell v. Hazen*, 3 Sneed (Tenn.), 20; *Congreve v. Morgan*, 5 Duer (N. Y.), 495. If the servant be acting in the execution of the au-

But when the servant steps aside from the course of his service,

authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. Hoar J. in *Howe v. Newmarch*, 12 Allen, 57; *Wilton v. Middlesex Railroad Co.* 107 Mass. 110. A servant intrusted the reins to a stranger who was riding with him: master was held liable. *Booth v. Mister*, 7 C. & P. 66. An action lies against a master for damage occasioned by his servant exercising an unruly horse in an improper place; *Michael v. Allestree*, 2 Lev. 172; or by negligence in keeping a fire used in the master's service. 1 Ld. Ray. 264; *Viscount Canterbury v. Atty. Gen.* 1 Phil. 316, 317. In *Parsons v. Winchell*, 5 Cush. 593, Mr. Justice Metcalf said: "The act of the servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. 'He is liable,' says Lord Kenyon, 'to make compensation for the damage consequential from his employing of an unskilful or negligent servant.' 1 East, 108." The liability of any one other than the party actually guilty of any wrongful act, proceeds on the maxim, *Qui facit per alium, facit per se*. Rolfe Baron, in *Reedie v. The London & N. W. Railway Co.* 4 Exch. 244. Mr. Justice Story adopts this maxim as the foundation of the liability. Story Agency, § 551. In *Thames Steamboat Co. v. The Housatonic R. R. Co.* 24 Conn. 40, *Hinman J.* said: "The principle that subjects a master for the tortious acts of the servant done in the performance of the master's business, and within the scope of the general authority conferred, is the same as that which subjects him for the acts of his servants done by his express direction given at the time. In both cases the maxim applies, *Qui*

facit per alium, facit per se, and the master shall be responsible for the acts of his agents to the same extent that he would be if he personally committed the wrong. But the remedies applicable to these several injuries are entirely different. In the former case, he is liable only in an action on the case, founded upon the negligence of the servant in the performance of his master's lawful business, whereas in the latter case, he is liable in an action of trespass caused by the act of his servant." In cases of bailment a stricter rule of liability prevails. Thus, where the servant of a bailee to keep for hire, takes and uses the goods bailed in the business in which he is employed by the bailee, his master is liable for any loss or damage resulting to the goods from the carelessness of the servant while so used, although no express assent of the master is shown. *Sinclair v. Pearson*, 7 N. H. 219; *Patteson J. in Randleson v. Murray*, 8 Ad. & El. 109; *Dench v. Walker*, 14 Mass. 500; *Arthur v. Balch*, 23 N. H. 157; *Jones v. Hart*, 2 Salk. 441. So, a smith, whose servant injures a horse brought to him to be shod, or a surgeon, whose servant treats a patient with gross want of skill, is liable to answer for the injury. 4 Bac. Abr. 584, Master and Servant. A master is not liable, under Rev. Stat. Mass. c. 51, § 3, for the damages sustained by a party, by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the travelled part of a road, when meeting another vehicle. *Goodhue v. Dix*, 2 Gray, 181. In *Parsons v. Winchell*, *ubi supra*, it was decided that a master and servant are not liable jointly in an action on the case for an injury occasioned by the negligence of the servant, while driving the horses and carriage of the master in his absence. But wherever the master would be liable in trespass for the act of his servant, he would be liable to be sued either alone or jointly with him who obeyed his command. See per Metcalf J. in *Parsons v. Winchell*, 5 Cush. 593.]

and does acts of tort or wrong, which are not connected with his duty to his master or with his master's business, the latter will not be responsible for the consequences of such acts.] (*k*¹⁴)

(*k*¹⁴) [2 Kent, 259; *Croft v. Alison*, 4 B. & Ald. 590; *McManus v. Crickett*, 1 East, 106; *McClenaghan v. Brock*, 5 Rich. 17; *Moore v. Sanborne*, 2 Mich. (Gibbs) 519; *Story Agency*, § 456; *Foster v. Essex Bank*, 17 Mass. 479; *Southwick v. Estes*, 7 Cush. 385, 386; *Kerns v. Piper*, 4 Watts, 222; *Brown v. Purviance*, 2 H. & Gill, 316; *Puryear v. Thompson*, 5 Humph. 397; *Armstrong v. Cooley*, 5 Gilman, 509; *Fuller v. Voyt*, 13 Ill. 277; *Howe v. Newmarch*, 12 Allen, 49. If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment. *Croft v. Alison*, *ubi supra*; *Howe v. Newmarch*, 12 Allen, 49; *Foster v. Essex Bank*, 17 Mass. 508. In this case, Parker C. J. said: "No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty towards me, that I shall be civilly answerable for such fraud. If I send him to market and he steps into a shop and steals, or upon false pretences cheats the shopkeeper of his goods, I think all mankind will agree, that I am not answerable for the goods he may thus unlawfully acquire. The rule of law is correctly laid down by Sir William Blackstone (1 Com. 429), viz. 'that the master is answerable for the act of his servant, if done by his command, either expressly given or implied.' And in another place, 'if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done

while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehavior.' 1 Com. 431.) The same rule will apply more strongly to frauds committed by the servant." In *Ellison v. Turner*, 8 T. R. 533, Lord Kenyon says: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if, he being master of the defendants' vessel, were to commit an assault upon a third person in the course of his voyage." The master is not liable for the wilful trespass of the servant, though the servant in other respects be at the time about the business of his master, unless the trespass has been authorized, assented to, or ratified by him. *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.* 2 Comst. 479; *Story Bailm.* § 402; *Lyon v. Martin*, 8 Ad. & El. 512; *Lowell v. Boston & Lowell R. R. Co.* 23 Pick. 25; *Schmidt v. Blood*, 9 Wend. 268. Where a servant wilfully drove his master's carriage against another, without the direction or assent of his master, the latter was not held liable. *M'Manus v. Crickett*, 1 East, 106. Where the servant, without his master's knowledge, takes his master's carriage and drives it about solely for his own purposes, the master will not be responsible for injury done by his management of it. *Sleath v. Wilson*, 9 C. & P. 607; *Mitchell v. Crassweller*, 13 C. B. 237; *Parke B. Joel v. Morrison*, 6 C. & P. 501. So, where a master permitted his servant to go to a fair with a horse and cart, it was held that the master was not liable for damage arising from the servant's negligent management of the horse. *Bard v. Yohn*, 26 Penn. St. 482.]

11. Sheriffs, and other Ministerial Officers.

By the common law, a sheriff was bound to execute process without fee or reward; (*l*) and he cannot now recover any remuneration for performing his official duty, beyond that which the law expressly allows him, even though there has been a promise to pay him at a higher rate. (*m*) So a high bailiff or sheriff, when called upon by the king's writ to return members of parliament, although he incur great expense therein, cannot, at common law, recover from a candidate any part of the expense so incurred; inasmuch as it arises from the performance of duties which he is bound to discharge by virtue of his office. (*n*)

But for executing a writ of *feri facias*, or *capias ad satisfaciendum*, the sheriff was entitled, under the stat. 29 Eliz. c. 4, to a poundage of twelve pence for every 20s. when the sum did not exceed 100*l.*; and sixpence for every 20s. above that sum, for which he should levy, or take the body in execution. (*o*) And now by the stat. 7 Will. 4 & 1 Vict. c. 55, the sheriff is entitled to such fees on the execution of civil process, as shall from time to time be allowed by an officer of the several courts of law at Westminster, charged with the duty of taxing costs in such courts, under the sanction and authority of the judges of the said courts respectively. But this statute does not repeal the 29 Eliz. c. 4; and it leaves the sheriff's right to poundage under that statute untouched. (*p*)

So by the stat. 3 Geo. 1, c. 15, s. 16, the sheriff is entitled, upon executing a writ of *habere facias possessionem aut seisinam*, to have for poundage twelve pence for every 20s. of the yearly value of the lands whereof possession is given, where the whole exceedeth not the yearly value of 100*l.*; and sixpence for every 20s. per annum above that value.

And the third section of the same statute entitles a sheriff to

(*l*) *Dew v. Parsons*, 2 B. & Ald. 562, 563, 566, 568; *Graham v. Gill*, 2 M. & S. 294.

(*m*) *Bridge v. Cage*, Cro. Jac. 103.

(*n*) *Morris v. Burdett*, 1 Camp. 218; 2 M. & S. 212.

(*o*) The meaning of the act is, that if the debt exceed 100*l.* he shall have a shilling per pound for the first hundred, and

sixpence per pound for every pound exceeding a hundred; and not sixpence for every pound, where the whole debt exceeds 100*l.* Bac. Abr. Fees (B).

(*p*) *Per Cur. Pilkington v. Cooke*, 16 M. & W. 615, 625; *Davies v. Griffiths*, 4 M. & W. 377; and see *Wrightup v. Greenacre*, 10 Q. B. 1.

poundage on executing an *elegit*. (*q*) But it has been held that, on executing this writ, he cannot claim poundage on the whole amount of the debt; but only on the annual value of the land extended. (*r*)

The sheriff is entitled to his poundage on a *feri facias*, although the parties settle before a sale; (*s*) and his claim is not defeated by the judgment and execution being subsequently set aside for irregularity. (*t*) But he is not entitled to poundage, if the money be paid to him without a levy being made; (*u*) nor where he pays the money into court, under the 43 Geo. 3, c. 46, s. 2, or the 7 & 8 Geo. 4, c. 71. (*x*)

So it was held, that the sheriff was entitled to his poundage on executing a writ of *ca. sa.*, although the defendant went to prison without paying the debt; (*y*) or although he was in the custody of

(*q*) See further, as to this, Tidd Pr. 9th ed. 1039, 1040.

(*r*) Nash v. Allen, 4 Q. B. 784; and see Price v. Hollis, 1 M. & S. 105.

(*s*) Alchin v. Wells, 5 T. R. 470. [A sheriff has no right to sell the property of a defendant in an execution for the purpose of collecting his fees, after notice of satisfaction of the judgment; he must look to the plaintiff or his attorney for them. Anderson v. Anderson, 4 Wend. 474. It seems, however, that the sheriff would be permitted to sell in case of collusion between the parties, and where the plaintiff and his attorney are irresponsible. Anderson v. Anderson, *supra*. Where several executions are issued at the same time to different counties, upon the same judgment, and satisfaction is made upon one execution, the sheriff of every other county to whom an execution is issued, and who has levied upon property sufficient to satisfy the same, is entitled to poundage, which he may demand from the plaintiff; but he cannot levy it on the property of the defendant. Bolton v. Lawrence, 9 Wend. 435. See Knickerbocker v. Shepherd, 3 Cowen, 383. In Ohio it is held, that a sheriff is only entitled to his commissions, or poundage, on money paid to satisfy an execution, where he has actually received and paid the money over, not where the defendant himself pays the

money to the plaintiff. Vance v. Bank, 2 Ham. 215. In Illinois, where a sheriff sells property and realizes a part of the debt, he is entitled to commissions only on the sum made. But where he does not sell, and real estate be levied on, the appraisement furnishes an equitable rule by which to calculate the commissions. Bryan v. Buckmaster, 1 Ap. Bre. 23.]

(*t*) Rawstorne v. Wilkinson, 4 M. & S. 256. [See Scott v. Shaw, 13 John. 378.]

(*u*) Graham v. Grill, 2 M. & S. 296.

(*x*) Stewart v. Bracebridge, 2 B. & Ald. 770.

(*y*) Lake v. Turner, 4 Burr. 1981. [The sheriff is entitled to his poundage on a *ca. sa.* immediately on taking the defendant's body. Adams v. Hopkins, 5 John. 252. And he is not obliged to resort to the plaintiff, but may demand his poundage of the attorney. Adams v. Hopkins, *supra*. And in all cases the attorney is liable to the sheriff for his fees. Ousterhout v. Day, 9 John. 114; Adams v. Hopkins, 5 John. 252. See, also, Merchant v. Mason, 2 Wend. 601. An attorney, who employs an officer to serve a writ, and gives him directions therefor, renders himself responsible for the officer's fees for such service, and also for all disbursements made and liabilities incurred by the officer, in the ordinary course of the business intrusted to him, as, for instance,

the sheriff when the writ was delivered to him ; (z) or although the writ was delivered to the sheriff, indorsed with a direction, "to be returned *non est inventus*," provided the debtor afterwards surrendered to the sheriff. (a)

Before the passing of the recent statutes it was held, that the poundage given to the sheriff by the legislature, was intended as a complete satisfaction for his trouble ; so that he could not, for example, maintain an action for the expense incurred by him in seizing and keeping possession of goods under a *feri facias*, at the request of the plaintiff, although they were not sold, in consequence of his refusing to give an indemnity against the claims of third persons. (b) So, where a sheriff, in executing an *elegit*, charged 5*l.* per cent. besides his poundage, for an auctioneer to sell malt, the charge was disallowed. (c) And the rule still is, that although the sheriff, on making a levy under an execution, is entitled to a percentage on the whole proceeds of the sale, including a year's rent paid by him to the landlord, as well as on the amount of the execution ; yet he has no right to any extra expenses incurred by him in levying, except such as are included in the table of fees framed under the 7 Will. 4 & 1 Vict. c. 55. (d)

A sheriff may maintain an action for his poundage ; (e) or he may retain it out of the sum levied. (f) But he cannot sue the plaintiff's attorney for his fees ; nor is evidence admissible to prove that, by the custom of a particular county, he was entitled to look to the attorney and not to his client, for payment thereof. (g)

Sheriff's remedies for his poundage.

If the sheriff take more (h) than he ought, the excess may be recovered from him in an action for money had and received ; (i) or it may form a ground of set-off to an ac-

Remedies against him.

for the storage of property attached ; provided the officer give the attorney reasonable notice of the disbursements and liabilities so incurred. *Tarbell v. Dickinson*, 3 Cush. 345.]

(z) *Taylor v. Ward*, Tidd Pr. 9th ed. 1040.

(a) *Magnay v. Monger*, 4 Q. B. 817.

(b) *Bilke v. Havelock*, 3 Camp. 374 ; *Graham v. Grill*, 2 M. & S. 294.

(c) *The King v. Crackenthorp*, 2 Anst. 412. See further, *Rex v. Freeday*, 4 Price, 131.

(d) *Davies v. Edmonds*, 12 M. & W. 31 ; *Slater v. Hames*, 7 M. & W. 413 ; and see

Phillips v. Viscount Canterbury, 11 M. & W. 619 ; *Hutchinson v. Humbert*, 8 M. & W. 638.

(e) *Tyson v. Paske*, 2 Ld. Raym. 1212.

(f) See 15 & 16 Vict. c. 76, s. 123 ; 43

Geo. 3, c. 46, s. 5.

(g) *Mayberry v. Mansfield*, 9 Q. B. 754 ; 16 L. J. Q. B. 102 ; *Seal v. Hudson*, 4 D. & L. 760.

(h) See *Buckle v. Bewes*, 3 B. & C. 688 ; *George v. Perring*, 4 Esp. 63.

(i) *Stevens v. Rothwell*, 3 B. & B. 145 ; *Rumsey v. Tufnell*, 2 Bing. 255 ; *Longdill v. Jones*, 1 Stark. 345.

tion brought by him ; (*k*) or an action for treble damages may be maintained against him under the 29 Eliz. c. 4, though the extortion were the act of his bailiff ; (*l*) or the party may obtain redress by summary application to the court against the sheriff, under the 7 Will. 4 & 1 Vict. c. 55.

A bailiff who executes process has his remedy for his fees against the attorney in the cause, and not against the client. (*m*)

And a commissioner to examine witnesses may maintain an action for his fees. (*n*)

12. Surveyors.

A surveyor is bound to use due care, and to exercise a reasonable degree of skill, in executing the business intrusted to him. Thus, if he be employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense of the works, he is bound to ascertain *for himself*, by experiments, the nature of the soil ; even although a person, previously employed for that purpose by the committee, has made such experiments, and has given him, by their desire, information of the result. And if an engineer or surveyor, who is so employed, makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it ; and it afterwards turns out that, owing to his negligence or want of skill, such estimate is grossly incorrect, and that the work cannot be done but at a much greater expense, he is not entitled to recover anything for his trouble in making such estimate or connected therewith. (*o*)

So, if a man professes to act as a valuer of any particular kind of property, he is bound to know the general rules which are applicable to the valuation of that description of property ; *e. g.* if he professes to be a valuer of ecclesiastical property, he ought to know

(*k*) *Dew v. Parsons*, 2 B. & Ald. 562. But the defendant is not entitled to set off, in this action, expenses paid by him for an appraisement of the goods of the execution debtor, made prior to a sale thereof by the sheriff, to trustees for the benefit of the creditors of such debtor. *Marshall v. Hicks*, 10 Q. B. 15.

(*l*) *Wrightup v. Greenacre*, 10 Q. B. 1 ;

Pilkington v. Cooke, 16 M. & W. 615 ; *Woodgate v. Knatchbull*, 2 T. R. 148.

(*m*) *Brewer v. Jones*, 10 Exch. 655 ; *Maile v. Mann*, 2 Exch. 608 ; *Wa bank v. Quarterman*, 3 C. B. 94 ; *Newton v. Chambers*, 1 D. & L. 869.

(*n*) *Stokeld v. Collingson*, Carth. 208 ; *S. C. Comb.* 186.

(*o*) *Moneypenny v. Hartland*, 1 C. & P. 352 ; *S. C.* 2 Ib. 378, on a second trial.

the distinction which exists, between valuing in cases between an incoming and an outgoing tenant, and in cases between an incoming and an outgoing incumbent. (*p*)

It is usual for architects and surveyors to charge, for their trouble, a percentage on the cost of the works with reference to which they are employed. But in *Upsdell v. Stewart*, (*q*) — which was an action for work and labor done as a surveyor, and where evidence was offered on behalf of the plaintiff, that it was the uniform practice of surveyors to charge 5*l.* per cent. on all money allowed to the workmen, — Lord Kenyon was of opinion that such a demand was exorbitant; and he ruled, “that the plaintiff was entitled to a reasonable compensation for his labor, but was not to estimate that by the money laid out by the defendant in finishing his building.” And in a subsequent case, — where a surveyor claimed 5*l.* per cent. on the money laid out by the defendant in altering certain buildings, as a remuneration for having superintended such alterations as surveyor, — Lord Ellenborough left it to the jury to say, “whether this mode of charging was vicious or unreasonable; and if they thought it was, to deduct accordingly.” (*r*)

13. Witnesses.

Where a person, living within the bills of mortality, is subpoenaed to give evidence within the same, the practice seems to be to leave a nominal sum with the subpoena; but, in other cases, a person subpoenaed to give evidence upon the trial of a cause is not obliged to attend, nor, if he attend, is he obliged to give evidence, unless a reasonable sum for his expenses in going to, attending at, and returning from the trial, be paid or tendered to him. (*s*) Nor where less is offered, is the wit-

Entitled to a reasonable sum for expenses.

(*p*) *Jenkins v. Betham*, 15 C. B. 168.

(*q*) *Peake*, 193.

(*r*) *Chapman v. De Tastet*, 2 Stark. 294.

(*s*) Per Tindal C. J. *Betteley v. M'Leod*, 4 Scott, 131, 136. A witness who is subpoenaed by both parties, is entitled before giving evidence to have all his expenses paid by the party who calls him at the trial. *Allen v. Yoxall*, 1 C. & K. 315. [So, a witness is always entitled to charge full fees for every case in which he may have

been summoned. *Robison v. Banks*, 17 Geo. 211; *House v. Barber*, 10 Vt. 158; *Flores v. Thorn*, 8 Texas, 377. But a person is not entitled to certify his attendance as a witness, unless he comes into the court-house, and is in actual attendance there. *Kennedy v. Wright*, 34 Maine, 351. Where, however, a person has been summoned to attend court as a witness, and his fees have been paid him, but he neglects to attend, assumpsit will not lie for money had and received, to recover the

ness obliged to trust to the court allowing him more when he comes to be sworn ; for perhaps the party may not call him, and then it may be difficult for him to get home again. (*t*) And a person who is subpœnaed, and who attends at the trial of a civil action may, without any express contract, maintain an action against the party who subpœnaed him, for his necessary expenses of attendance ; (*u*) even, as it seems, although he refused, at the trial, to give evidence unless such expenses were paid ; and, in consequence, was not examined. (*x*)

But the attorney in a cause, who subpœnas a witness to give evidence, is not personally liable to him for his expenses, unless there be an express contract to that effect, or some circumstances from which such a contract will be implied. (*y*)

[In the United States the fees of witnesses for travel and attendance are generally prescribed by law ; (*y*¹) and where this is so, they are entitled to no further remuneration for their services, however inadequate the prescribed fees may be. No agreement to pay a witness more than the prescribed fees for his attendance at court, will, in an ordinary case, be sustained.] (*y*²)

Right of witnesses to remuneration in United States.

money back. *Leighton v. Twombly*, 9 N. H. 483. But see *Martin v. Andrews*, 7 El. & Bl. 1, where it was held, that an action is maintainable for money had and received to recover back conduct-money paid to a party upon a subpœna to attend a trial as witness, where, in consequence of the cause being settled, no trial takes place, and the party incurs no expense, and does not act in consequence of the subpœna.]

(*t*) *Chapman v. Pointon*, 2 Str. 1150 ; *Hallett v. Mears*, 13 East, 15, 16 a ; *Bowles v. Johnson*, 1 Bl. 36 ; *Fuller v. Prentice*, 1 H. Bl. 49 ; *Ashton v. Haigh*, 2 Chit. 201 ; *Tidd Pr.* 9th ed. 806. But a witness subpœnaed by a defendant who is indicted for a conspiracy, is bound to give evidence, although the defendant refuse to pay his expenses. *Rex v. James*, 1 C. & P. 322. If the attorney of the defendant be subpœnaed by the plaintiff to produce books, he is not entitled to be paid as a witness. *Pritchard v. Walker*, 3 C. & P. 212.

(*u*) *Pell v. Daubeny*, 5 Exch. 955.

(*x*) *Hallett v. Mears*, 13 East, 15 ; but, in this case, there was some evidence of an express contract. And see *Edmonds v. Pearson*, 3 C. & P. 113.

(*y*) *Robins v. Bridge*, 3 M. & W. 114, 118.

(*y*¹) ["There is a reason why witnesses' fees should be fixed by law, and at a moderate sum, lest poor suitors should be unable to seek redress, and witnesses be tempted to lean towards wealth and power." Per Ellsworth J. in *Dodge v. Stiles*, 26 Conn. 467.]

(*y*²) [*Dodge v. Stiles*, 26 Conn. 463. Perhaps an agreement for extra compensation might be upheld, if the witness was about going abroad at the time he would be wanted to attend court ; and he agrees that he will remain and give up his journey and is summoned, or if he agrees to attend court in person, where a party would only be entitled to take his deposition. So, it has been suggested that, if a witness agrees with a party to attend and testify

The law, however, does not in general, [even in England,] give a witness any right to compensation for his loss of time ; and, therefore, a promise to pay such compensation is not binding, (z) even although the witness was an attorney. (a)

When entitled to compensation for loss of time.

But it has been said, that there is a distinction between the case of a man who sees a fact, and is called to prove it in a court of justice ; and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge. The latter is under no such obligation ; and therefore, the party who selects him must pay him. (b)

So, where the senior clerk of the petty bag office, by one of his clerks, attended at a trial to produce the roll of attorneys in the court of chancery ; he was held to be entitled to certain usual and reasonable fees for such attendance, over and above his expenses. (c)

But in such cases the party, and not the attorney in the cause, is *primâ facie* liable to pay the compensation claimed by the witness. (d)

without being summoned, and he is not summoned, but attends and testifies, any reasonable promise for compensation is good, and may be enforced. Per Ellsworth J. in *Dodge v. Stiles*, 26 Conn. 466, 467.]

(z) *Willis v. Peckham*, 1 B. & B. 515 ; *Moor v. Adam*, 5 M. & S. 156. [See *Dodge v. Stiles*, 26 Conn. 463.]

(a) *Collins v. Godefroy*, 1 B. & Ad. 950. [See *Sweany v. Hunter*, 1 Murph. 181.]

(b) Per Maule J. *Webb v. Page*, 1 C. & K. 23. And see *Bayley v. Beaumont*, 11 Moore, 497, as to compensation to scientific men for making models, &c. As to the case of a surveyor, who attends as a witness on an appeal against a parochial assessment, see *Paine v. Guardians of the Strand Union*, 8 Q. B. 326.

(c) *Bentall v. Sydney*, 10 A. & E. 162.

(d) *Lee v. Everest*, 2 H. & N. 285.

SECTION V.

Contracts respecting Moneys.

- | | |
|----------------------------|--------------------|
| 1. Money lent. | 4. Interest. |
| 2. Money paid. | 5. Account stated. |
| 3. Money had and received. | |

1. Money lent.

1. The common count for *money lent* is not maintainable, if the loan was effected by a transfer to the defendant of bank *stock*; for stock is not *money*. (*e*)

When the common count for is maintainable. But where it appeared that A., in the year 1837, transferred 1,000*l.* in the four per cents to B., who possessed other stock of the same description; that B., after some years, sold out all his stock, including the 1,000*l.*; and that he had from time to time, until A.'s death, made payments to A. equal to interest at five per cent. upon that sum; that, after the death of A., her executor wrote to B. referring to the transaction as a loan of money; whereas B. asserted, in reply, that he had been employed by A. to purchase an annuity for her, and that *he had* done so, but no purchase of an annuity was proved; it was held, that there was evidence to go to the jury, in support of a count for money lent. (*f*)

And where a person lends money, nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was actually intended to be, and was received as being made by him. (*g*)

Nor does this action lie if the money was not lent to the defendant, and upon his sole credit, but was lent and actually delivered to another person, who was to become primarily liable to the plaintiff; so that the defendant's undertaking was merely collateral and conditional, that is, to pay if the party receiving the money did not. (*h*) And, on this ground, a count that the defendant is indebted to the plaintiff, "for money lent by him to E. F., at the defendant's request," is bad. (*i*)

(*e*) *Nightingale v. Devisme*, 5 Burr. Salk. 23; *Forth v. Stanton*, 1 Wms. 2589; S. C. 2 Bl. 684; *Jones v. Brinley*, Saund. 211 a, b. The remedy is by special action on the guaranty. See *Glyn v. 1 East*, 1.

(*f*) *Samuel v. Danbury*, 2 C. B. 803. Hertel, 8 Taunt. 208.

(*g*) *Sims v. Bond*, 5 B. & Ad. 389.

(*i*) *Ib.* See, especially, *Marriott v. Lis-*

(*h*) *Marriott v. Lister*, 2 Wils. 141; ter, 2 Wils. 141.

Butcher v. Andrews, Carth. 446; S. C. 1

But if the defendant alone was trusted, and *he* was, in fact, *the borrower*, although the money was delivered by the plaintiff to another person at the defendant's request, the common count for money lent may be maintained. (*k*) And it has been decided, that a declaration against a husband, "for money lent to *his wife*, at his request," is maintainable; for, in such a case, the defendant alone could, in point of law, be liable. (*l*)

And so, where the defendant gave a memorandum, whereby he acknowledged the receipt from the plaintiff of a sum of money "on the behalf of E. E.," *an infant*, and whereby the defendant promised to be accountable for such sum on demand; it was held, that the memorandum was evidence to support a count for money lent, as against the defendant. (*m*)

So, money advanced upon a contract, to repay it on demand or to execute a mortgage, may, after refusal to execute the mortgage, be recovered under the count for money lent. (*n*) And so, where a party advanced money on exchequer bills, which were afterwards repudiated at the exchequer office on the ground that the comptroller's signature was forged; he was held to be entitled to recover his money in this form of action. (*o*)

In *James v. Cotton* (*p*) it appeared, that the plaintiff agreed to let land to the defendant on building leases, and to lend him 4,000*l.* to assist him in the erection of twenty houses, the money to be repaid by June, 1828. The defendant agreed to build the houses, to convey them as a security for the loan, and to repay the money. When six houses were built, and 1,168*l.* had been advanced, the plaintiff requested the defendant not to go on with the other fourteen houses; and, the defendant having desisted, it was held that, after June, 1828, the plaintiff might recover the 1,168*l.* on the count for money lent.

Where money is lent generally upon, or is secured by a deposit of goods, the lender has his remedy by action against the borrower, without returning the goods; and, to discharge the person of the

(*k*) *Bull v. Sibbs*, 8 T. R. 328.

(*l*) *Stephenson v. Hardy*, 3 Wils. 388.

[Where money is lent on the credit of the borrower, though a third person, debtor of the borrower, signs a promissory note for the amount of the money, and the lender receives the note, yet if such note is not paid when due, he may maintain an

action against the borrower for money lent.

Marston v. Boynton, 6 Met. 127.]

(*m*) *Harris v. Huntback*, 1 Burr. 373.

(*n*) *Bristow v. Needham*, 9 M. & W. 729.

(*o*) *Bank of England v. Tomkins*, 6 Jur. 348.

(*p*) 7 Bing. 266.

borrower, there must be a special agreement to stand to the pledge only. (*q*) And where money was advanced on the security of a deposit of shares, and the lender agreed to give the borrower twenty-one days' notice before proceeding to compel repayment of any part of such money, and that at each repayment a proportionate amount of the shares should be given up; it was held that, after twenty-one days' notice, the lender might sue on the common count for the money so lent. (*r*)

So, where money is lent on mortgage, and the mortgage deed contains no covenant, either express or implied, on which an action can be maintained for such money, the lender may recover it on the common count for money lent. (*s*)

So, money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, to be repaid when called for by check. (*t*)

So, it appears that an executor may, under certain circumstances, lend money out of the assets in his hands; and sue, in his representative character, for the recovery of the amount. (*u*)

But where money is advanced by a parent to a child, it appears that the presumption is, that such advance was by way of gift, and not by way of loan. (*x*)

So, money lent for the express purpose of accomplishing an illegal object cannot be recovered by the lender. Therefore, money lent to, and applied by the borrower, for the express purpose of settling losses on illegal stock-jobbing transactions between the borrower and third persons, to which the lender was no party, cannot be recovered by the lender. (*y*) So, money lent for the purpose of gaming or playing at an illegal game, cannot be recovered. (*z*) And where the plain-

Money lent
on illegal
contract.

(*q*) *South Sea Co. v. Duncomb*, Str. 919; *Bank of England v. Glover*, 2 Ld. Raym. 753; *Lawton v. Newland*, 2 Stark. 73; *Emes v. Widdowson*, 4 C. & P. 151.

(*r*) *Scott v. Parker*, 1 Q. B. 809.

(*s*) *Yates v. Aston*, 4 Q. B. 182, 196; *Mathew v. Blackmore*, 1 H. & N. 762; and see *Burnett v. Lynch*, 9 A. & E. 532; *King v. King*, 3 P. Wms. 361.

(*t*) *Pott v. Clegg*, 16 M. & W. 321. Proof of a deposit with a banker, and payment of interest by him, is evidence of money lent. *Sutton v. Toomer*, 7 B. & C. 416. For money lent by one of several

partners in a banking firm, out of the funds of the bank, all may sue. *Alexander v. Barker*, 2 C. & J. 133. See *Jones v. Fleming*, 7 B. & C. 217.

(*u*) *Ante*, 376.

(*x*) Per Bayley J. *Hick v. Keats*, 4 B. & C. 69, 71. [And interest is not chargeable on an advancement. *Osgood v. Breed*, 17 Mass. 356; *Hall v. Davis*, 3 Pick. 450.]

(*y*) *Cannan v. Bryce*, 3 B. & Ald. 179; *De Begnis v. Armistead*, 10 Bing. 107.

(*z*) *M'Kinnell v. Robinson*, 3 M. & W. 434; [*White v. Buss*, 3 Cush. 448.]

tiff and defendant, having been taken prisoners in Portugal, jointly solicited and obtained the liberation of themselves, and the ransom of the defendant's ship, contrary to the stat. 45 Geo. 3, c. 72; to effect which, the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount; the court held, that the plaintiff could not recover on the bill. (*a*)

2. A bill of exchange or promissory note in the ordinary form, seems to be evidence of money lent, as between the payee and drawer of the former, or the payee and the maker of the latter. (*b*)

Evidence in support of.

But an instrument, payable on a contingency, in the following terms: "Nine years after date I promise to pay to —, the sum of — with interest, provided D. M. shall not return to England, or his death be duly certified in the mean time;" — was held not to raise any presumption that the sum had been lent. (*c*)

So, it appears that an I O U is not evidence of money lent by the holder to the party signing it. (*d*) Nor is the fact of one party drawing a check in favor of another, any evidence of money lent by the former to the latter. (*e*)

2. Money paid.

The common count for money paid states, that the plaintiff sues the defendant "for money payable by the defendant to the plaintiff, for money paid by the plaintiff, for the defendant, at his request." (*f*) And this form of action is maintainable, in every case in which the plaintiff has paid money (*f*¹) to a third party at the request, express or implied,

When the common count for, is maintainable.

(*a*) *Webb v. Brooke*, 3 Taunt. 6.

449; but see *Douglas v. Holme*, 12 A. & E. 641.

(*b*) *Story v. Atkins*, 2 Str. 719; Bayl. Bills, 5th ed. 537; per Bayley J. *Morgan v. Jones*, 1 C. & J. 167. See *Wells v. Girling*, Gow, 22, note; Moo. & M. 66. [See *Cushing v. Gore*, 15 Mass. 74. An action for money lent is supported by a writing in these words, "Due A. B. eighty dollars, on demand. B. C." *Hay v. Hinde*, 1 Chip. 214. So in these words, "Lent R. P. \$56. I say received by me, R. P." *Peniston v. Wall*, 3 J. J. Marsh. 37.]

(*c*) *Pearce v. Davis*, 1 Moo. & Rob 365.

(*f*) 15 & 16 Vict. c. 76, s. 59, sched. B.

(*f*¹) [An agent to collect a debt, if with the consent of the debtor he credits it to his principal as paid, and charges it in his private account to the debtor, may maintain assumpsit for money paid, or money had and received, against the debtor, although there was in fact no payment or receipt of money. *Emerson v. Baylies*, 19 Pick. 55. See, also, *Bonney v. Seeley*, 2

(*c*) *Morgan v. Jones*, 1 C. & J. 162.

(*d*) *Fesenmayer v. Adcock*, 16 M. & W.

of the defendant, and with an undertaking, express or implied, on his part to repay it. (*g*)

But to support this count it is necessary, *first*, that *money* should have been paid or expended by the plaintiff. Therefore, Plaintiff must have paid *money*; where the plaintiff's goods were sold under a distress by the defendant's landlord, for rent due from the defendant, it was held that money paid was not maintainable, for no money had passed from the plaintiff. (*h*) And so, a surety for the defendant, who has merely given his bond or other undischarged security to the creditor for the original debt, cannot maintain an action for money paid; (*i*) for the giving a security is not equivalent to actual payment.

Wend. 481; *Ainslie v. Wilson*, 7 Cowen, 662; *Randall v. Rich*, 11 Mass. 498, cited post, below, in this note; *Cumming v. Hackley*, 8 John. 202; *Cornwall v. Gould*, 4 Pick. 447. See *Lomax v. Pendleton*, 3 Call, 538. Where a surety had discharged the debt of the principal by giving a *promissory note*, it was held, that he might maintain an action for money paid. *Pearson v. Parker*, 3 N. H. 366. In Massachusetts a similar doctrine was held, in the case of *Cornwall v. Gould*, 4 Pick. 444; *Chandler v. Brainard*, 14 Pick. 285; *Doolittle v. Dwight*, 2 Met. 561. See *Ingalls v. Dennett*, 6 Greenl. 79; per Gibson C. J. in *Craig v. Craig*, 5 Rawle, 91; *Cumming v. Hackley*, 8 John. 202; *Lapham v. Barnes*, 2 Vt. 213; *Douglass v. Moody*, 9 Mass. 553; *Peters v. Barnhill*, 1 Hill, 234, 236, note; *Wetherby v. Mann*, 11 John. 518; *M'Lelland v. Crofton*, 6 Greenl. 333. The recovery of judgment against the surety and levy of execution on his property seems to be sufficient payment. *Randall v. Rich*, 11 Mass. 494; *Lord v. Staples*, 23 N. H. 448; *Bonney v. Seeley*, 2 Wend. 481; *Miller v. Miller*, 7 Pick. 133; *Morrison v. Berkley*, 7 Serg. & R. 238; *Miller v. Howry*, 3 Penn. 380; *S. P. Gardner v. Cleaveland*, 9 Pick. 337; *Hodges v. Armstrong*, 3 Dev. 253. And so also, being committed in execution seems to be equivalent to payment. *Parker v. United States*, *Peters C. C.* 266. A surety extinguishing a debt by the payment of only *one half* its amount, is not entitled to recover more from his principal.

Bonney v. Seeley, 2 Wend. 481. See *Crozier v. Grayson*, 4 J. J. Marsh. 517. Payment by a surety of his principal's debt, in land, will sustain the action for *money paid*. *Ib.*; *S. P. Ainslie v. Wilson*, 7 Cowen, 662; *Randall v. Rich*, 11 Mass. 498. If the indorser of a note has paid to the indorsee a part of the amount thereof, he may recover of the maker the amount so paid, in an action for money paid, although a part of the amount due on the note remains unpaid; and it is immaterial whether such payment be made in money or other property, or whether such property was of less value than the amount for which it was received, if it be received as payment of so much. *Garnsey v. Allen*, 27 Maine, 366; *Baltimore & Susq. R. R. Co. v. Faunce*, 6 Gill, 68.]

(*g*) *Brittain v. Lloyd*, 14 M. & W. 762, 773.

(*h*) *Taylor v. Higgins*, 3 East, 169; *Moore v. Pyrke*, 11 East, 52. See the observations of the court of exchequer on this latter case, in *Rogers v. Maw*, 15 M. & W. 444, 448; in which case, that court expressed a very strong opinion, that if the goods of A. be seized and sold under an execution against B. and the debt of B. be paid with the proceeds of such sale, A. may treat this as *money* paid to him to the use of B.

(*i*) *Maxwell v. Jameson*, 2 B. & Ald. 51; per Parke J. *Power v. Butcher*, 10 B. & C. 329, 346. See *Williamson v. Henley*, 6 Bing. 299.

This count, however, is maintainable, although it appear that the money paid was not wholly the money of the plaintiff. And, accordingly, where A. applied to B. and C. — who were in partnership — for an advance; and they sent him an acceptance by B. alone, which A. got discounted; and, the holder thereof having sued B., the latter paid the acceptance out of the moneys of B. and C.; it was held that A. was liable to him in an action for money paid. (*k*)

Secondly, it is necessary, in order to support this action, that the money sought to be recovered should have been paid *to the use* of the defendant. And, therefore, if A., by ^{to the use of the defendant;} agreement with B., bind himself to pay, either to B. or to a third party, a sum of money which B. is primarily liable to pay; and B. is afterwards called upon to pay, and does pay such sum, his only remedy against A. is on the special agreement. For, the money so paid by B., having been paid in discharge of his own liability, was not money paid to the use of A., and cannot be recovered on the common count. (*l*)

But still, this action may be maintained, although the defendant was not relieved from any liability by the payment made by the plaintiff. (*m*)

And it is also necessary, *thirdly*, that the defendant's express or implied *request* to the plaintiff, to pay the money for ^{and at his request.} his use, should be shown by the plaintiff. (*m*¹) Accord-

(*k*) *Driver v. Burton*, 17 Q. B. 989; 21 L. J. Q. B. 157.

(*l*) *Spencer v. Parry*, 3 A. & E. 331; *Lubbock v. Tribe*, 3 M. & W. 607.

(*m*) *Brittain v. Lloyd*, 14 M. & W. 762, 773; *Lewis v. Campbell*, 8 C. B. 541; *Westropp v. Solomon*, *Ib.* 345.

(*m*¹) [*Taylor v. Colten*, 6 Ired. 69. One cannot, by a voluntary payment of another's debt, make himself creditor of that other. *Richardson v. M'Ray*, 1 Const. R. 772; *Mayor &c. of Baltimore v. Hughes*, 1 Gill & J. 497; *Turner v. Egerton*, *Ib.* 433; *Rensselaer Glass Factory v. Reid*, 5 Cowen, 603; *Weakly v. Brahan*, 2 Stew. 500; *Rumney v. Elsworth*, 4 N. H. 138; *Little v. Gibbs*, 1 South. 213; *Jones v. Wilson*, 3 John. 434; *Beach v. Vandenburg*, 10 John. 361; *Winsor v. Savage*, 9 Met. 346; *Willis v. Hobson*, 37 Maine,

403. Where a ship is owned by two persons in equal shares, and one of them, without any authority from the other, and without his knowledge or consent, repairs the vessel in a home port, he cannot recover of the other owner any portion of the money expended for such repairs. *Benson v. Thompson*, 27 Maine, 471. A surety who pays money voluntarily on a judgment absolutely barred, loses his remedy against his principal; but a payment cannot be said to be voluntary, as long as the judgment can be enforced in any way, either by *scire facias* or action of debt. *Randolph v. Randolph*, 3 Rand. 490. In general, a promise to repay money to be advanced by another, raises a presumption of the request of the promisor. *Knox v. Martin*, 8 N. H. 154.]

ingly, it is not sufficient merely to prove that the defendant was liable to a third person, and that the plaintiff discharged such liability; but it must appear that the plaintiff did so at the instance, either express or implied, of the defendant; or that the act was subsequently recognized by him. (*n*) For it is a clearly established principle, that no assumpsit will be raised by the mere voluntary payment of the debt of another person; inasmuch as one man cannot become the creditor of another without his knowledge or consent. (*o*)

When the plaintiff is in a condition to prove that the money for which he sues in this action was paid in consequence of an actual request by the defendant, he will, of course, be entitled to recover. But where there has not been an actual request, he must show that the payment was made under circumstances from which a request would be implied; and it often becomes a matter of some nicety, to determine when such circumstances really existed. The following may be stated as the leading principles on this subject:—

1. If money has been paid by the plaintiff, in discharge of a liability which he has taken upon himself at the defendant's instance or by his authority, the law will imply that it was paid at his request.

Thus where the plaintiff, who had done work for the provisional committee of a projected railway company, had been induced by the defendant and others, who were members of such provisional committee, to sue certain other members of the said committee for his bill, in order to relieve themselves of any amount which the plaintiff might thereby recover; and the plaintiff, in bringing those actions, incurred costs to the amount of 228*l.*, to his own attorney; it was held that he might recover that sum from the defendant, on the count for money paid. (*p*)

So if, by the custom of trade, an agent be obliged, without any default on his part, to pay money on account of a contract into which he has entered for his principal, the law will imply a promise, on the part of the latter, to repay the same as money which has

(*n*) See per Cur. *Sleigh v. Sleigh*, 5 Exch. 514, 516. *Saund.* 364, note (1); *Jeffries v. Gurr*, 2 B. & Ad. 833; [*Oden v. Elliot*, 10 B.

(*o*) *Stokes v. Lewis*, 1 T. R. 20, cited in *Mon.* 313; *Lewis v. Lewis*, 3 Strobbh. 530; *Jones v. Nanney*, M'Cl. 25, 38; *Child v. Taylor v. Baldwin*, 10 Barb. 626.]
Morley, 8 T. R. 610, 613; *Lord Galway* (*p*) *Bailey v. Haines*, 13 Q. B. 815, *v. Mathew*, 10 East, 264, 265; 1 Wms. 832.

been paid to his use; and it appears that this will be the case, whether he was acquainted with the custom by which the agent was governed or not. (*q*) And if A., in the presence of B., verbally promise C. that he, A., will pay a debt due from B. to C., if B. does not; A. will be held to have thereby acquired an authority to pay such debt on the default of B.; and if he pay it before that authority is countermanded, he will be entitled to recover it as money paid to B.'s use. (*r*)

But where the contract between a broker and his principal was, that the former should sell registered shares for the latter; whereas, instead of doing so, he sold shares, the scrip for which was, at the time of the contract, in the office of the company for registration, so that the broker could not deliver them; and in consequence thereof he had other shares bought in against him, and was obliged to pay the difference; it was held that he could not charge his principal with the difference so paid, as money paid to his use. (*s*)

2. Where the plaintiff is *compelled* to pay the defendant's debt, in consequence of his neglect or omission so to do, the law infers that the defendant requested the plaintiff to ^{Compulsory payments.} make the payment for him, and gives him the action for money paid. (*s*¹) Thus, if a tenant pay ground-rent due from his landlord, in order to prevent his, the tenant's, goods from being distrained for such rent, he may recover it as money paid to the landlord's use. (*t*) So where the plaintiff, at the request of the defendant, left a carriage on the premises of the defendant, and the carriage was there seized under a distress for rent due from the de-

(*q*) Per Maule J. *Westropp v. Solomon*, 8 C. B. 345; 19 L. J. C. P. 1, 8; and see *Cropper v. Cook*, L. R. 3 C. P. 194; *Taylor v. Stray*, 2 C. B. N. S. 175; *Bayley v. Wilkins*, 7 C. B. 880; 18 L. J. C. P. 273; *Pollock v. Stables*, 12 Q. B. 765; *Dails v. Lloyd*, *Ib.* 531; *Bayliffe v. Butterworth*, 1 Exch. 425; *Young v. Cole*, 4 Scott, 489; *Sutton v. Tatham*, 10 A. & E. 27; *Pawle v. Gunn*, 6 Scott, 286. It would seem, therefore, that *Child v. Morley*, 8 T. R. 610, and *Lightfoot v. Creed*, 8 Taunt. 268, are now overruled.

(*r*) *Alexander v. Vane*, 1 M. & W. 511.

(*s*) *Bowlby v. Bell*, 3 C. B. 289, 294.

(*s*¹) [*Hale v. Huse*, 10 Gray, 99; *Sar-*

gent v. Currier, 48 N. H. 310. See *Ticonic Bank v. Smiley*, 27 Maine, 225; *Butler v. Wright*, 2 Wend. 369; S. P. 6 Wend. 284; *Wells v. Porter*, 7 Wend. 119; *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Swasey v. Little*, 7 Pick. 296. Where A. bought goods and had them charged to B. who has been compelled to pay for them, B. may recover in a suit for money paid for A. *Scoles v. Coleman*, *Wright*, 92.]

(*t*) See *Sapsford v. Fletcher*, 4 T. R. 511. Mortgagee of a term is liable to the lessee, for ground rent paid by him, although such mortgagee has not taken possession. *Stone v. Evans*, *Peake Add. Ca.* 94.

defendant, it was held that the plaintiff, having paid the rent, might recover the amount from the defendant as money paid to his use. (*u*) And it is unnecessary for the plaintiff, in order to entitle him to reimbursement in such a case, to resist the distress, if valid, by replevying or bringing an action. (*x*) For where a party is in a situation where he *may be* compelled by law to pay a sum of money, although he be not *actually* compelled to do so, and he pays it accordingly, the action will lie. (*y*) Nor will the payment by an under-tenant to the ground landlord, of rent due to him, be considered voluntary, merely on account of the ground landlord having given time to the under-tenant for the payment of such rent. (*z*)

So, where certain lands were bought in at a sale by auction, and — the commissioners of excise having refused to remit the duties — they were paid by the auctioneer; he was held entitled to recover back the amount from his employer, in an action for money paid. (*a*) So where a cause, in which there were several plaintiffs, was referred to arbitration, the arbitrators to have full authority over the costs of the suit and reference; and the order of reference provided, that the death of any of the parties should not operate as a revocation of the arbitrator's authority; and it appeared that, after the death of H., one of the plaintiffs, P., another of them, paid certain costs which the plaintiffs in the suit were by the award ordered to pay; it was held, that P. was entitled to recover from the executors of H. a proportion of the costs so paid, as money paid to their use; and that his claim extended as well to that part of such costs which was incurred after, as to that which had been incurred before the death of their testator. (*b*) So, where it appeared

(*u*) *Exall v. Partridge*, 8 T. R. 308; [*Sargent v. Currier*, 48 N. H. 310, 311.]

(*x*) See *Maydew v. Forrester*, 5 Taunt. 615; *Brown v. Hodgson*, 4 Ib. 189; *Austen v. Ward*, R. & M. 116; *Hales v. Freeman*, 1 B. & B. 399.

(*y*) See *Sleigh v. Sleigh*, 5 Exch. 514, 517; [*Frith v. Sprague*, 14 Mass. 455; *Goodall v. Wentworth*, 20 Maine, 322; *Mauri v. Heffernan*, 13 John. 58; *Powell v. Smith*, 8 John. 249. Payment of a demand was made by the administratrix of a surety, after her liability was barred by the statute of limitations, in favor of executors and administrators, and when she

had a good defence; but as this defence was not available to the principal, if he had been sued by the creditor, he was held liable for the amount so paid in his account. *Shaw v. Loud*, 12 Mass. 447. If the surety on a note pays the holder before the note is payable by its terms, a cause of action against his principal for indemnity accrues at the time when the note becomes payable, and not before. *Tillotson v. Rose*, 11 Met. 299.]

(*z*) *Carter v. Carter*, 5 Bing. 406.

(*a*) *Brittain v. Lloyd*, 14 M. & W. 762.

(*b*) *Prior v. Hembrow*, 8 M. & W. 873.

that the custom was that, on the granting of a lease, the lessor's solicitor should prepare the instrument, but that the lessee should pay the expense thereof; it was held, that the lessor might recover from the lessee, as money paid to his use, the amount of costs paid by him, the lessor, to his solicitor, for preparing the lease granted to the lessee. (*c*) And where lands, charged with the repair of a bridge, are occupied by a person not the owner, such occupier is responsible to the public for the repairs of the bridge; but he may demand reimbursement from the owner, in an action for money paid to his use. (*d*)

So, a trustee under a will, who pays the legacy duty upon an annuity, after the expiration of four years from the testator's death, may recover the amount from the legatee as money paid to his use. (*e*)

So, where the indorser of a bill of exchange, having been sued by the holder, paid him part of the amount of the bill; it was held that he might recover the same against the acceptor as money paid to his use. (*f*) So where A., having accepted a bill drawn upon him by B., for money lent by B. to A., compounded with B. and his other creditors, and paid the composition; and an indorsee of the bill afterwards sued A., and compelled him to pay the amount; it was held that A. might recover the same from B., as money paid to his use. (*g*) And where the plaintiff had accepted a bill of exchange for the accommodation of one H., who deposited it with the defendant as a security for goods bought of him, at the same time disclosing the circumstances under which it had been obtained; and H. afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and compelled him to pay the amount, with costs; it was held that the plaintiff might recover from the defendant the amount of the bill, on the count for money paid. (*h*)

The defendant, having some bark to sell, applied to the plaintiffs to find a purchaser. The plaintiffs applied to T., who agreed to

(*c*) *Grissell v. Robinson*, 3 Scott, 329. *Bate v. Pane*, 13 Q. B. 900; 18 L. J. Q. A similar rule applies in the case of a B. 273.
marriage settlement. *Helps v. Clayton*, (*f*) *Pownall v. Ferrand*, 6 B. & C. 439.
71 C. B. N. S. 553. (*g*) *Hawley v. Beverley*, 6 M. & G. 221;

(*d*) *Baker v. Greenhill*, 3 Q. B. 148.

and see *Mallalieu v. Hodgson*, 16 Q. B. 689.

(*e*) *Hales v. Freeman*, 1 B. & B. 391.

See further, *Foster v. Ley*, 2 Scott, 438;

(*h*) *Bleaden v. Charles*, 7 Bing. 246.

purchase the bark if equal to sample. The bark having been shipped, the defendant sent the invoice to the plaintiffs, and requested them to accept a bill of exchange for the price, which they did upon the offer of a *del credere* commission. The bark, however, not being equal to sample, T. refused to take it; and, the plaintiffs being called upon to pay the bill when due, it was held that they were entitled to recover the amount thereof, as money paid to the defendant's use. (*i*)

And so, if a carrier deliver to B., by mistake, goods consigned to C., and B. appropriate the goods to his own use, and the carrier, on demand, even without action, pay C. their value; he, the carrier, may recover the amount from B., as money paid to his use. (*k*)

But where goods came to a wharfinger, consigned to A.; and B., believing them to be meant for himself, carried them from the wharf, and used them before he discovered the mistake; Lord Ellenborough held, that the wharfinger, after paying A. the value of the goods, could not maintain against B. an action for money paid, to recover the amount. (*l*)

And where the payment was made with knowledge on the part of the plaintiff that he was not bound to pay, such payment will be held not to have been made with the implied authority of the defendant. Thus, where the drawer of an accommodation bill, after the bill became due, paid part of the amount to the holder, but without having received notice of dishonor of the bill, and without any actual request from the acceptor; it was held, that he could not recover the same from the acceptor, on the count for money paid. (*m*)

So if, without any request from the defendant, the plaintiff voluntarily allow goods belonging to him to be or remain on the defendant's premises, and they are there distrained for rent due from the defendant, and the plaintiff pay such rent in order to redeem his goods; he cannot recover the amount so paid, as money paid to the defendant's use. (*n*) So where the plaintiff and the defendant, respectively, were underlessees, at distinct rents, of separate portions of premises, the whole of which were held at an entire

(*i*) Hooper v. Treffrey, 1 Exch. 17.

(*l*) Sills v. Laing, 4 Camp. 81.

(*k*) Brown v. Hodgson, 4 Taunt. 189.

(*m*) Sleight v. Sleight, 5 Exch. 514.

See, also, Spencer v. Parry, 3 A. & E. 331,
338.

(*n*) England v. Marsden, L. R. 1 C. P.
29.

rent under one original lease; and the plaintiff, under threat of distress, paid the whole rent due under the original lease; it was held, that he could not recover a proportion thereof from the other underlessee, as money paid to his use. (*o*) And where by an award it was ordered, that the costs of the reference should be paid, one moiety by A., and another by B.; and B. took up the award and paid the whole of such costs; it was held, that he could not recover a moiety from A., as money paid to his use. (*p*)

So where, in consequence of some misconduct or breach of duty by a jailer, or a sheriff, or his officer, he becomes liable to pay a debt, sought to be recovered in an action against a third person; the former cannot, after he has satisfied the debt, recover the amount from the original debtor, as money paid to his use. (*q*)

So, where the plaintiff accepted a bill for the accommodation of one F., — who was pressed at the time by the defendant, for payment of a demand of 7*l.* 7*s.*, — on the understanding that F. was to get the bill discounted, and to give the plaintiff the surplus above the 7*l.* 7*s.*; and it appeared that F. deposited the bill with the defendant as a security for that sum, — the defendant knowing the circumstances, and that the plaintiff had had no value for his acceptance; but the defendant, notwithstanding, indorsed the bill over, and kept the proceeds; and the plaintiff, being afterwards sued by the holder of the bill, paid him the amount; it was held, that he could not maintain an action against the defendant to recover the same, as money paid to his use. (*r*)

So, where one of two joint prize agents was imposed upon by a person who falsely pretended to be one of the seamen entitled to prize money; and the agent, in consequence, paid money to the impostor, which he was afterwards obliged to pay over again to the person legally entitled to receive it; it was held, that he could not recover from his co-agent a moiety of the money so paid. (*s*) So where a check drawn by a customer upon his banker, for a sum of money described in the body of the check in words and figures, was afterwards unlawfully altered by the holder, who substituted a

(*o*) *Hunter v. Hunt*, 1 C. B. 300. [See *Fisher v. Kinaston*, 18 Vt. 489. But if land owned in severalty by different persons be charged with a legacy, and one of them be compelled to pay the whole, he will be entitled to a contribution from the others. *Swasey v. Little*, 7 Pick. 296.]

(*p*) *Bates v. Townley*, 2 Exch. 152.

(*q*) *Pitcher v. Bailey*, 8 East, 171.

(*r*) *Asprey v. Levy*, 16 M. & W. 851.

(*s*) *Mackreath v. Margetson*, B. R. April, 1795; MS.; S. C. *nom.* *M'Ireath v. Margetson*, 4 Dougl. 278. See *Gingell v. Glascock*, 8 Bing. 86.

larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid the larger sum to the holder ; it was held, that he could not charge the customer for anything beyond the sum for which the check was originally drawn, there being no genuine order or authority to pay more. (t)

And resistance, in the first instance, to a demand claimed to accrue due at intervals ; the omission of such resistance, and subsequent uniform acquiescence, will sometimes preclude a party from contending, that moneys paid in respect of such demand were paid by compulsion. Thus where a distress was made on a tenant, for the whole of the rent due from him ; and there was a wrongful refusal to allow the land tax, — the lease being silent on the subject, — although the tenant protested against his liability to pay it ; but during five succeeding years he paid the land tax, without disputing his liability : it was held that he could not recover from his landlord, in an action for money paid, any part of the sums so paid by him for land tax. (u)

3. There are cases, however, in which a request has been implied, so as to support this action, although the party who paid the money did so merely as a volunteer. (u¹) Thus, where the plaintiff, in the absence of the defendant, the husband, incurred an expense in burying the wife of the defendant, in a manner suitable to his condition ; it was held that, inasmuch as the plaintiff, in so doing, had acted in the discharge of a duty which the defendant himself was under a strict legal liability to perform, he might recover from the defendant the money so expended, although there had been no express request or consent on his part to the plaintiff's act. (x) And so, where one

Request may be implied, though payment voluntary.

(t) *Hall v. Fuller*, 5 B. & C. 750. And see very fully, *Roberts v. Tucker* (in Cam. Scac.), 16 Q. B. 560.

(u) *Spragg v. Hammond*, 2 B. & B. 59.

(u¹) [When one subscribes, with others, a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription, an action for money paid, laid out, and expended, may be maintained to recover the amount of the subscription, or such portion of it as will be equal to the

subscriber's proportion of the expense incurred. *Bryant v. Goodnow*, 5 Pick. 228 ; *Buckmaster v. Grundy*, 3 Gil. 626 ; *Homes v. Dana*, 12 Mass. 190 ; *Farmington Academy v. Allen*, 14 Mass. 172.]

(x) *Ambrose v. Kerrison*, 10 C. B. 776 ; 19 L. J. C. P. 135 ; *Bradshaw v. Beard*, 12 C. B. N. S. 344 ; *Jenkins v. Tucker*, 1 H. Bl. 90. [See *New Salem v. Wendell*, 2 Pick. 341, 344 ; *Forsyth v. Ganson*, 5 Wend. 558 ; *Cincinnati v. Ogden*, 5 Ham. 27.]

party voluntarily incurs expenses in burying another, the executor of the deceased, if he have assets, is liable to repay the expenses so incurred. (y)

4. We have seen that where one person becomes surety for another at his request, the law implies a promise by the latter, that he will repay the surety whatever he may be compelled to pay the creditor. (z) And in such cases the surety has a right of action against the principal, the instant he pays the

Payments by
sureties.

(y) *Rogers v. Price*, 3 Y. & Jer. 28. *Quere*, whether in such a case the executor be not liable, even without assets. Per Jervis C. J. *Ambrose v. Kerrison*, *supra*.

(z) Per Ashhurst J. *Toussaint v. Martinnant*, 2 T. R. 100, 104; [Appleton v. Bascom, 3 Met. 169; Powell v. Smith, 8 John. 249; Hassinger v. Solnes, 5 Serg. & R. 8; Bunce v. Bunce, Kirby, 137; Gibbs v. Bryant, 1 Pick. 118; Ward v. Henry, 5 Conn. 596; Smith v. Sayward, 5 Greenl. 504; Lansdale v. Cox, 7 Mon. 405; Gray v. Bowles, 1 Dev. & Bat. 437; Isley v. Jewett, 2 Met. 168; Hall v. Smith, 5 How. (U. S.) 96; Powers v. Nash, 37 Maine, 322; Goodall v. Wentworth, 20 Maine, 322. Where the surety of a surety pays the debt of the principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Hall v. Smith*, 5 How. (U. S.) 96. An administrator of a surety who pays the debt, may maintain an action in his own name against the principal. *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. 432. So, on the other hand, where L. as principal, and S. as surety, gave a note to A., and L. having died, the payee neglected to exhibit the note to L.'s executor within two years from the grant of administration, it was held, that the surety still remained liable, and, having paid the note, was entitled to recover the amount of the executor, although no action could have been main-

tained against the executor upon the note, at the time the surety paid it. *Sibley v. McAllaster*, 8 N. H. 389. In *Appleton v. Bascom*, *supra*, the question arose, whether this implied promise of the principal to repay the surety arose when the surety incurred the obligation, or not until he paid the money, when his right of action against the principal first accrued. *Wilde J.* said: "We think it is well settled, that when a surety becomes bound for his principal, and at his request, the law implies a promise of indemnity by the principal to the surety to repay the latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. So, the law is laid down in *Wood v. Leland*, 1 Met. 389; and so it was decided in *Gibbs v. Bryant*, 1 Pick. 121; in *Toussaint v. Martinnant*, 2 T. R. 104; in *Howe v. Ward*, 4 Greenl. 200; and in many other cases. In *Gibbs v. Bryant*, there had been given a written promise of indemnity, and the court say that "the written contract produced contained nothing more than what the law would imply." "And so the law has been settled for a long time, although in ancient times no action at law could be maintained where a surety had paid the debt of his principal; the only remedy being to be had in a court of equity. But very many equity principles have been adopted by courts of law in modern times, allowing actions to be maintained on implied promises by the party to do what equity and justice require to be done, where there is no express contract. And the implied promise of indemnity in the present case

creditor, for so much money paid to his use. (*a*) Thus, where the plaintiff, who was a shareholder in a banking company, became surety for advances to be made by the company to the defendant; and the defendant afterwards executed a composition deed, to which the plaintiff and the banking company were parties, and which contained a stipulation for a reserve of remedies against sureties for the defendant; it was held, that the plaintiff having been compelled to pay the defendant's debt to the banking company, he was entitled to recover the amount so paid, as money paid to the defendant's use. (*b*) So bail may recover against the principal, any expenses they may have reasonably incurred in taking him into custody, for the purpose of surrendering him. (*c*) So a party who accepts or indorses a bill of exchange, or who indorses a note for the accommodation of another, (*d*) is entitled, on paying the amount, to recover it from the party for whose benefit he thus became responsible.

must be considered as made at the time when the plaintiffs became responsible to the creditor on the bond. The plaintiff's liability was the consideration of the principal's implied promise of indemnity, and the promise must be considered as made at the time when that liability was assumed. And the plaintiffs, when they paid the money, might have declared on said implied promise, or for money paid, in common form, as the declaration was. "The time of making the contract is not to be determined by the form of the action." See *Bachelder v. Fisk*, 17 Mass. 464. The same view, in reference to the time when the implied promise of contribution was made, was taken by Lord Campbell C. J. in *Batard v. Hawes*, 2 El. & Bl. 287, 296. So, in *Dobyns v. McGovern*, 15 Mis. 662. The implied promise of the principal is to pay the sureties, separately, whatever shall be paid by each of them, on the principal's account; but, if the circumstances require it, the promise of the principal to indemnify his sureties, may be considered as made to them jointly and severally. In *Appleton v. Bascom*, 3 Met. 169, 172, Wilde J. said: "According to the doctrine in *Osborne v. Harper*, 5 East, 225; *Pearson v. Parker*, 3 N. H. 366; *Jewett v.*

Cornforth, 3 Greenl. 107; where money is paid by two or more sureties jointly for the principal, or where the money paid is raised on their joint credit, their proper remedy for reimbursement is a joint action; but if they pay separately, then their proper remedy is by a separate action, and a joint action cannot be maintained. In either case, however, the action, whether joint or several, is founded on the promise of indemnity expressly or impliedly made at the time when the sureties first became bound. When a promise is implied by law, such a promise will be implied as will give to the party, who may suffer damage by the breach of it, a suitable and proper remedy." See *Gould v. Gould*, 8 Cowen, 168; *Boggs v. Curtin*, 10 Serg. & R. 211; *Weston C. J. in Goodall v. Wentworth*, 20 Maine, 324.]

(*a*) Per Parke B. *Davies v. Humphreys*, 6 M. & W. 153, 167.

(*b*) *Kearsley v. Cole*, 16 M. & W. 128.

(*c*) *Fisher v. Fallows*, 5 Esp. 171.

(*d*) The acceptor of a bill is not liable to an indorser (there being no *privity* between them independently of the bill) for the costs of an action brought thereon by the holder against the indorser. *Dawson v. Morgan*, 9 B. & C. 618.

And in these cases, the sum paid by the surety may be recovered upon the common count for money paid.

But although, as we have seen, there is an implied promise by the transferee of shares in a joint-stock company, to indemnify the transferor against calls made subsequent to the transfer, and before registration thereof by the transferor; (*e*) it is still doubtful whether, if the transferor has been compelled to pay such calls, he can recover the same from the transferee, as money paid to his use. (*f*)

So, it seems that if a surety take a bond or other specialty, as a counter-security from his principal, he cannot resort to the count for money paid. (*g*)

And any *costs* necessarily incurred by the surety, and which he may be entitled to recover from the principal, can only be recovered on a special count founded on the implied promise of indemnity. (*h*)

5. So, if several persons become sureties for the same debt, either jointly or severally, or by the same or different instruments (*h*¹) and one surety pays more than his proportion of the demand, he may recover against each (*h*²) co-surety an aliquot share of the excess, as money paid to his use. (*i*)

Contribution
between
sureties.

(*e*) *Ante*, 745.

(*f*) *Sayles v. Blanc*, 14 Q. B. 205; 19 L. J. Q. B. 19.

(*g*) *Toussaint v. Martinnant*, 2 T. R. 100, 104. See *Crofts v. Tritton*, 8 Taunt. 365.

(*h*) See form, Chit. jun. on Pl. 2d ed. 134; [*Bonney v. Seeley*, 2 Wend. 481; *Beckley v. Munson*, 22 Conn. 299.]

(*h*¹) [Sureties for the same principal, and for the same engagement, are entitled to contribution, though bound by different instruments, and at different times. *Harris v. Ferguson*, 2 Bailey, 397; *Chaffee v. Jones*, 19 Pick. 260, 264; *Norton v. Coons*, 3 Denio, 130, 132.]

(*h*²) [The contract of the co-sureties to contribute is several, and a separate action is to be brought against each for his separate share. *Parker v. Ellis*, 2 Sandf. (S. C.) 223; *Craythorne v. Swinburne*, 14 Ves. 160, 164; *Cowell v. Edwards*, 2 Bos. & Pull. 268; *Shaw C. J. in Chaffey v.*

Jones, 19 Pick. 264; *Kelby v. Steel*, 5 Esp. 194. And of course a surety, who has paid the debt, may release any one of his co-sureties without releasing the others. See *Fletcher v. Grover*, 10 N. H. 368; *Crowdus v. Shelby*, 6 J. J. Marsh. 61.]

(*i*) *Davies v. Humphreys*, 6 M. & W. 153, 168; *Ex parte Gifford*, 6 Ves. 805; *Kemp v. Finden*, 12 M. & W. 421; *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Winchelsea*, Ib. 270. See 2 Pothier by *Evans*, 77, 81; [*Brown v. Lee*, 6 B. & C. 689; *Sadler v. Nixon*, 5 B. & Ad. 936; *Blackett v. Weir*, 5 B. & C. 387; *Fletcher v. Grover*, 11 N. H. 369; *Bachelor v. Fisk*, 17 Mass. 464; *Boardman v. Paige*, 11 N. H. 431; *Chaffee v. Jones*, 19 Pick. 260, 264; *Johnson v. Johnson*, 11 Mass. 356; *Crowdus v. Shelby*, 6 J. J. Marsh. 62; *Mitchell v. Sproul*, 5 J. J. Marsh. 270; *Lidderdale v. Robinson*, 2 Brock. 160; *Taylor v. Savage*, 12 Mass. 98. On the same ground as the liability of a principal

So, where there are several co-sureties, and one of them takes from the principal a collateral security for the repayment of any

to reimburse his surety, depends the right of one surety, or joint-contractor, who has been obliged to satisfy the whole demand, to recover a proportional contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy. *Cowell v. Edwards*, 2 Bos. & P. 268; *Turner v. Davies*, 2 Esp. 478; *Brown v. Lee*, 6 B. & C. 697; *Deering v. Winchelsea*, 2 Bos. & P. 270. The right to contribution from a co-surety does not accrue till it is ascertained that one surety has paid more than his proportion of the whole debt, after which it accrues, *toties quoties*, on the occasion of each payment that he is subsequently forced to make. *Davies v. Humphreys*, 6 M. & W. 168; *Lord Eldon, Ex parte Gifford*, 6 Ves. 808. This right of contribution was formerly enforced only in equity. See *Davies v. Humphreys*, 6 M. & W. 168; *Lord Eldon*, in *Craythorne v. Swinburne*, 14 Ves. 160, 169. The doctrine of contribution is "founded, not on contract, but on the principle that equality of burden as to common right is equity." Mr. Chancellor Kent, in *Campbell v. Mesier*, 4 John. Ch. 334; 1 Story Eq. Jur. §§ 492, 493; *Edger v. Knapp*, 5 Man. & Gr. 758. But in *Norton v. Coons*, 3 Denio, 130, *Bronson C. J.* remarked: "When it was settled that the courts of law would enforce contributions between sureties, what was before only an equitable became a legal obligation; and where there is a legal right to demand a sum of money, and there is no other remedy, the law will, for all purposes of a remedy, imply a promise of payment." See *Bachelder v. Fisk*, 17 Mass. 468, 469. The implied promise of the sureties to contribute, like that of the principal to indemnify them, is made at the time when they became responsible for him; their respective rights and liabilities are then fixed, although no cause of action arises, until payments have been made to an extent calling for contri-

bution. *Appleton v. Bascom*, 3 Met. 169; *Batard v. Hawes*, 2 El. & Bl. 287; *Boardman v. Paige*, 11 N. H. 431; *Peaslee v. Breed*, 10 N. H. 489. And the rule of law would seem to be that, when one of two or more co-signers of a note, assuming no new ground of liability, still continues liable upon the original contract to the creditor, and is lawfully compelled, by virtue of such contract, to pay the debt, or discharge the original liability of all the co-signers to the creditor, in such case, the equitable liability of the other co-signers, for contribution of their fair proportion, will still remain, notwithstanding any contract of the creditor for the relief of such other co-signers, and notwithstanding they may be discharged by the operation of the statute of limitations from that liability to the creditor. *Woods J.* in *Boardman v. Paige*, 11 N. H. 431, 438; *Peaslee v. Breed*, 10 N. H. 489; *Odell v. Dana*, 33 Maine, 182; *Whipple v. Stevens*, 19 N. H. 150. The executor or administrator of a deceased co-surety may be called upon for contribution. *Batard v. Hawes*, 2 El. & Bl. 287; *Assby v. Ashby*, 7 B. & C. 444; *Bachelder v. Fisk*, 17 Mass. 264; *Sibley v. McAllaster*, 8 N. H. 389. But see *Waters v. Riley*, 2 H. & Gill, 305. The action for contribution may be sustained without any proof of a previous demand upon the co-surety. *Chaffee v. Jones*, 19 Pick. 260, 268; *Collins v. Boyd*, 14 Ala. 505. And it is not necessary to show an inability of the principal to pay. *Odlin v. Greenleaf*, 3 N. H. 270; *Goodall v. Wentworth*, 20 Maine, 322; *Cage v. Foster*, 5 Yerger, 261; *Cowell v. Edwards*, 2 Bos. & Pull. 268. The law seems to be held otherwise in Kentucky. *Poignard v. Vernon*, 1 Monroe, 47; *Pearson v. Duckham*, 3 Litt. 386; *Daniel v. Ballard*, 2 Dana, 296. If the debt has been paid by one of the sureties for less than the nominal amount, he can claim contribution of his co-surety only upon the amount actually paid by him. *Tarr v. Ravenscroft*, 12

sum which he may be called upon to pay in discharge of the principal's debt; such surety will still be entitled, on paying more than his proportion of that debt, to sue his co-sureties for contribution. (*k*)

But if one of several sureties be called upon after the bankruptcy of a co-surety, to pay more than his proportion of the principal's debt, he cannot sue the bankrupt co-surety for contribution. (*l*)

So, where one of two co-sureties paid the debt of the principal,

Grattan (Va.), 642.] The right to contribution arises, although the surety paid the debt after having given a bond for it, without the knowledge of the co-sureties. *Dunn v. Slee*, 1 Moore, 2.

(*k*) *Done v. Walley*, 2 Exch. 198, 200. [See *Morrison v. Taylor*, 21 Ala. 779. In *Bachelor v. Fisk*, 17 Mass. 464, it was held that, in the case of an assignment of property from a principal to a surety, for the purpose of indemnifying him in part, such assignment will inure to the benefit of all the sureties, and that a plaintiff who has received money from such a fund can only recover from his co-sureties their just proportions, or aliquot parts, of the sum he may have paid beyond the sum so received from the property assigned. See *M'Mahon v. Fawcett*, 2 Rand. 514; *Hinsdale v. Murray*, 6 Vt. 136; *Roberts v. Sayre*, 6 Monroe, 188; *Moore v. Moore*, 4 Hawks, 358. The general doctrine deducible from the authorities on this subject, and the general position to be laid down as based upon and sustained by them, would seem to be that where joint promisors, or co-sureties, have received equal benefits, or been relieved from common burdens, neither shall recover over against another, unless for the excess paid by him beyond his due proportion or equal share. *Woods J. in Fletcher v. Grover*, 11 N. H. 368, 373, 374. In *Gould v. Fuller*, 18 Maine, 364, 366, *Weston C. J.* said: "Where one of several co-sureties receives security or moneys from the principal, the whole comes to the benefit of all the sureties. It has the same effect as if so much had been paid by the principal

himself to the creditor. Until an adjustment is made, whatever indemnity or payment one receives, he must account for with his co-sureties. So the law was laid down in *Bachelor v. Fisk*, *supra*. To the same effect are the cases of *Messer v. Swan*, 4 N. H. 481; and of *Low v. Smart*, 5 N. H. 353;" *Tyus v. De Jarnette*, 26 Ala. 280; *Taylor v. Morrison*, 26 Ala. 728. In *Messer v. Swan*, *supra*, it was held that in general whatever payment one surety may receive from the principal shall come to the benefit of all. It was, however, there intimated that where payment has been made, and the matter of contribution has been adjusted, each may look to the principal for a reimbursement of his share, on his separate account. And in *Gould v. Fuller*, *supra*, it was decided that if payment of the debt for which all were liable has been made by one surety, and the claim against each of the others to contribute has become fixed, each may look to his principal for a reimbursement of the share paid by him, on his separate account. In the same case it was also held that if one of two sureties has actually paid the debt for which both were liable, he may recover against the other surety half the amount thereof, although after such payment he may have been repaid by the principal the other half expressly for his separate indemnity. See *Ilseley v. Jewett*, 2 Met. 168.]

(*l*) This was held to be a "liability to pay money on a contingency," within the 12 & 13 Vict. c. 106, s. 178; *Adkins v. Farington*, 5 H. & N. 586; and see 32 & 33 Vict. c. 71, s. 31.

out of moneys of the latter which he had in his hands at the time, and which he was entitled to apply to that purpose ; it was held that he could not recover against his co-surety for contribution. (*m*)

So, it has been held, that if the surety from whom contribution is claimed, became bound at the request of the surety who seeks to recover it, he is not liable ; for, in such case, the implied promise is negatived. (*n*)

Nor does the right to contribution extend to any part of the *costs* paid or incurred by the surety, in attempting to defend, or in settling legal proceedings taken by the creditor against him to recover the debt. (*o*) But where the plaintiff and the defendant had ex-

(*m*) *Goepel v. Swinden*, 1 D. & L. 888, 891.

(*n*) *Turner v. Davies*, 2 Esp. 478 ; and see *Thomas v. Cooke*, 8 B. & C. 728 ; [Parker C. J. in *Taylor v. Savage*, 12 Mass. 98, 102 ; *Daniel v. Ballard*, 2 Dana, 296 ; *Byers v. M'Clanahan*, 6 Gill & J. 256 ; *Apgar v. Hiler*, 4 Zab. (N. J.) 812 ; *Batard v. Hawes*, 2 El. & Bl. 287, 297. If two persons sign the same obligation, as sureties for a third, one of them at the request of the principal, and the other at the request of the first surety, they are not co-sureties as between themselves, but the first surety stands in the relation of principal to the second ; is responsible to him for whatever he may be compelled to pay ; and has in no event any claim against him for contribution. Bell J. in *Cutter v. Emery*, 37 N. H. 567, 575, and cases cited ; *Blake v. Cole*, 22 Pick. 101 ; *Taylor v. Savage*, 12 Mass. 98. So, if the original arrangement between the parties was inconsistent with the fact that each was to pay his share, no action for such contribution could be maintained. Thus, if by an arrangement between themselves, one of the joint-contractors, though liable to the creditor, was not to be liable to pay any portion of the debt, it is clear that no action could be maintained against him, though, if the relief from the legal liability were alone looked to, it would follow that he was liable to contribute. Lord Campbell C. J. in *Batard v. Hawes*, 2 El. & Bl. 287, 297. A guarantor cannot be compelled to contribute for the benefit of a

surety. *Longley v. Griggs*, 10 Pick. 121. So, where parties have indorsed a note separately and successively, in the usual mode, the second indorser is not liable to contribute to the first, though neither has indorsed for value. *McDonald v. Magruder*, 3 Peters, 470, 477.]

(*o*) *Knight v. Hughes*, 3 C. & P. 467 ; *S. C. Moo. & M.* 247 ; *Roach v. Thompson*, Moo. & M. 487. [Where an action was commenced by the holder of a note against all the co-signers, and judgment was recovered against one only, upon payment of the damages and costs of the judgment, the party against whom the judgment was recovered was held not to be entitled to contribution from the other co-signers in respect to costs. *Boardman v. Paige*, 11 N. H. 431, 434. *Woods J.* said : "The costs were never a burden common to the plaintiff and defendant. No judgment was recovered against the defendant for the costs, but only against the plaintiff alone. Nor does it appear that the defendant was ever in any manner under liability therefor to the judgment creditor. By the payment of the costs, then, the defendant clearly was not relieved from any burden common to the plaintiff and defendant ; and it not appearing that the defendant had expressly assumed to pay any portion thereof to the plaintiff, we can discover no principle, either of law or equity, entitling the plaintiff to contribution in respect of the costs in question."]

ecuted, as sureties, a warrant of attorney to secure an advance made to the principal; and, on default made by the principal, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff: it was held, that he was entitled to recover from the defendant a moiety of the costs of such execution. (*p*)

If there be several defendants in an action, and they agree to employ an attorney to manage the defence on their joint responsibility, and one of them pays the attorney's bill of costs, he may sue the others for contribution. (*q*) And it appears that the case will be the same, even although the defendants were partners; provided it can be shown that the contract with the attorney was made independently of their relation as partners. (*r*)

Other cases of contribution.

So, where one provisional committee-man paid more than his proportion of a debt contracted in respect of the scheme, it was held that he might sue the others in this action for contribution. (*s*)

So, where several parties, not partners, (*s*¹) are defendants in an action *ex contractu*, and the plaintiff recovers judgment against them, and one pays the whole demand, he may recover contribution against the others. (*t*)

So, if two parties agree to employ an arbitrator, and one pays a

(*p*) *Kemp v. Finden*, 12 M. & W. 421. [So, in a case where judgment had been recovered against an insolvent principal and his two sureties, and had been paid by one of the sureties, it was held that he might recover of his co-surety one half of the costs, as well as of the debt. *Weston C. J.* said: "The plaintiff paid the execution, including the costs. The failure to pay, which occasioned the costs, was imputable to the defendant as much as to the plaintiff. As the defendant was liable for half the execution, to that extent, the plaintiff paid money for his use and benefit. The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one applies equally to the other." *Davis v. Emerson*, 17 Maine, 64. See *Bonney v. Seeley*, 2 Wend. 481; *Cleveland v. Covington*, 3 Strobb. 184; *Fletcher*

v. Jackson, 23 Vt. 593; *Beckley v. Munson*, 22 Conn. 299.]

(*q*) *Edger v. Knapp*, 5 M. & G. 753.

(*r*) *Ib.* 758, 759.

(*s*) *Batard v. Hawes*, 2 E. & B. 287; *Boulter v. Peplow*, 9 C. B. 493.

(*s*¹) [*Edger v. Knapp*, 5 Man. & Gr. 758; *Murray v. Bogert*, 14 John. 318.]

(*t*) *Sadler v. Nixon*, 5 B. & Ad. 936; *Blackett v. Weir*, 5 B. & C. 387, 388. If a creditor recover against one of several joint, or joint and several debtors, in an action against him *only*, the claim to contribution equally arises. *Ib.* [See *Murray v. Bogert*, 14 John. 318; *Boardman v. Paige*, 11 N. H. 431.] Contribution between the assignees of a bankrupt; *Eden*, 2d ed. 214; *Hart v. Biggs*, Holt N. P. C. 245; *Lingard v. Bromley*, 1 V. & B. 114.

sum of money to take up the award, he is entitled to recover from the other a moiety of the sum so paid. (*u*)

So, if one of two joint contractors, upon a breach by them of their engagement, agree with the creditor to refer the amount of damages to arbitration; although this be done without the consent of the other co-contractor, still the former may, on paying the sum awarded, recover a moiety thereof from the latter, in an action for money paid. (*x*) And where the plaintiff and the defendant were two of a committee, appointed at a vestry meeting for the purpose of prosecuting nuisances on the waste lands and highways of a parish; and the committee appointed an attorney, who prosecuted, and obtained a verdict; after which the attorney sued the plaintiff for his bill of costs; and, the claim having been referred to arbitration, a sum of 235*l.*, with costs of the action, was awarded against the plaintiff: it was held, that he might sue the defendant for contribution. (*y*)

6. It has been held that an action lies to recover money paid

by the plaintiff, at the defendant's request, to a person to whom the defendant had lost the amount on an illegal bet upon a horse race. (*z*) But it may be doubted whether this case would now be supported. (*a*)

And where the plaintiff, by the defendant's authority and in his name, laid illegal bets on horses, and, the bets having been lost, the plaintiff paid them without the defendant's subsequent orders, it was held that he could not recover the money so paid. (*b*)

In *Petrie v. Hannay*, (*c*) it was held by the court, on the authority of the case of *Faikney v. Reynous*, (*d*) — but against the opinion of Lord Kenyon, — that where two persons engaged jointly

(*u*) *Per Cur. Marsack v. Webber*, 6 H. & N. 1, 6.

(*x*) *Burnell v. Minst*, 4 Moore, 340.

(*y*) *Holmes v. Williamson*, 6 M. & S. 158.

(*z*) *Alcinbrook v. Hall*, 2 Wils. 309. See *per Buller J. Petrie v. Hannay*, 3 T. R. 423, 424.

(*a*) *Per Cur. M'Kinnell v. Robinson*, 3 M. & W. 434, 442.

(*b*) *Clayton v. Dilly*, 4 Taunt. 165.

(*c*) 3 T. R. 418.

(*d*) 4 Burr. 2069, where to an action of debt on bond the defendant pleaded the

act of the 7 Geo. 2, c. 8; that the plaintiff and one Richardson were jointly concerned in certain contracts, contrary to that statute; that the plaintiff voluntarily paid the differences; and that the bond was given by the defendants for securing to the plaintiff Richardson's proportion of that loss; and, on demurrer, the court were clearly of opinion that the plaintiff was entitled to recover the amount which he had paid under the special authority of Richardson, though for an illegal purpose.

in an illegal stock-jobbing transaction, and incurred losses, and employed a broker to pay the differences; and one of them, with the *privity and consent* of the other, repaid the whole sum to the broker, he might recover a moiety from the other, as money paid to his use, notwithstanding the stat. 7 Geo. 2, c. 8, — on the ground, that the defendant had expressly authorized the plaintiff to make the payment for him. (*d*¹)

But it seems that these decisions are not considered good law at the present day. (*e*) And in a more recent case, — in which it appeared that the plaintiff and defendant had entered into an agreement to conduct an unlicensed theatre, and that the plaintiff had, at the defendant's instance, paid certain moneys for him which he, the defendant, was to pay to persons he employed in the management of it; it was held that an action for money paid could not be maintained. (*f*)

So, in the case of an action against several for a *tort*, if judgment for damages be recovered against them, and one be compelled to pay the whole, he has in general no claim for contribution against his co-defendants. (*g*) But if one party honestly and *bonâ fide*, in compliance with the directions of another, does an act not manifestly illegal in itself, and for such act damages are recovered in an action *ex delicto* against the party who did it, the other is bound to indemnify him. (*h*)

And if a party recover damages against one of two joint coach

(*d*¹) [McBlair v. Gibbes, 17 How. (U. S.) 232, 236; Armstrong v. Toler, 11 Wheat. 258.]

(*e*) See per Lord Chancellor *Ex parte* Mather, 3 Ves. jun. 373; Aubert v. Maze, 2 B. & P. 371; Brown v. Turner, 7 T. R. 630; Booth v. Hodgson, 6 T. R. 405; Steers v. Lashley, 1b. 61; Mitchell v. Cockburn, 2 H. Bl. 379; and other cases cited in Cannan v. Bryce, 3 B. & Ald. 181. And see per Abbott C. J. 1b. 183, and the cases cited and commented upon, Paley on Prin. & Agent, by Lloyd, 119, n. (*t*).

(*f*) De Begnis v. Armistead, 10 Bing. 107.

(*g*) Merryweather v. Nixan, 8 T. R. 186; Farebrother v. Ansley, 1 Camp. 343, 345; Wilson v. Milner, 2 Ib. 452; [Miller v. Fenton, 11 Paige, 18; Campbell v. Phelps, 1 Pick. 65; Vose v. Grant 15

Mass. 521; Thweatt v. Jones, 1 Rand. 328; Dupuy v. Johnson, 1 Bibb, 562; Wilford v. Grant, Kirby, 116; Peck v. Ellis, 2 John. Ch. 131; 20 Amer. Jur. 10, 11; Lowell v. Lowell & Boston R. R. Corp. 23 Pick. 24; Armstrong v. Toler, 11 Wheat. 258; Jacobs v. Pollard, 10 Cush. 287.]

(*h*) Betts v. Gibbins, 2 A. & E. 57; Adamson v. Jarvis, 4 Bing. 66, 72. See, also, Collins v. Evans, 5 Q. B. 820, 830; [*post*, "Illegal Contracts"; Drummond v. Humphreys, 39 Maine, 347; Jacobs v. Pollard, 10 Cush. 287; Avery v. Halsey, 14 Pick. 174; Coventry v. Barton, 17 John. 142; Moore v. Appleton, 26 Ala. 633; Acheson v. Miller, 2 Ohio (N. S.), 203; Campbell v. Campbell, 7 Cl. & Fin. 166.]

proprietors, for an injury sustained by him in consequence of the negligence of their servants, such proprietor may, it seems, sue his co-proprietor for contribution, on proof that he, the plaintiff, was not personally present when the accident occurred. (*i*) But one proprietor cannot, in such a case, maintain an action against his co-proprietor for money paid, if it appear that there was a partnership fund, out of which the expenses of the coach were first to be paid, and that then the residue was to be divided amongst the proprietors. (*k*)

3. Money had and received.

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| <ol style="list-style-type: none"> 1. In general. 2. Who may, in general, maintain it. 3. Against whom it lies, in general. 4. When it lies to recover a debt transferred by a creditor's order on his debtor, to pay the plaintiff. 5. Or money which a principal orders his agent to pay the plaintiff. 6. By principal against agent. 7. Against stakeholders. | <ol style="list-style-type: none"> 8. To recover money paid on a consideration which has failed. 9. Or money paid by mistake. 10. Or obtained by fraud. 11. Or by oppression or extortion. 12. Or upon an illegal contract. 13. Or money unjustly recovered at law. 14. Or fees of office, &c., unjustly received by an intruder. 15. Against sheriffs, &c. |
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1. The action for money had and received was called by Lord Mansfield, (*l*) "a kind of equitable action." But it has been recently observed, that "the notion about the action for money had and received being an equitable action is exploded in modern practice." (*m*)

Notwithstanding this, however, it would appear that, at the present day, the general scope of this action is regarded as being almost as extensive as it was in Lord Mansfield's time; it being still held, in conformity with the view expressed by him, that "where money is due *ex æquo et bono* it may be recovered in an action" for money had and received. (*n*) And accordingly it has been,

(*i*) *Wooley v. Batte*, 2 C. & P. 417.

(*k*) *Pearson v. Skelton*, 1 M. & W. 504.

(*l*) See *Moses v. Macferlan*, 2 Burr. 1005, 1012.

(*m*) Per Pollock C. B. and Parke B. *Miller v. Atlee*, 3 Exch. 799; 13 Jur. 431. In *Johnson v. Johnson*, 3 B. & P. 169, Lord Alvanley C. J. observed "that in the case of *Moses v. Macferlan*, some principles were laid down, which are certainly too large, and which he did not mean to rely on; such as, that wherever one man

has money which another ought to have, an action for money had and received may be maintained."

(*n*) Per Tindal C. J. *Smith v. Jones*, 6 Jur. 283, 284; der Lord Mansfield, *Moses v. Macferlan*, 2 Burr. 1005, 1012; [Eddy v. Smith, 13 Wend. 588; *Wright v. Butler*, 6 Wend. 200; *Irvine v. Hanlon*, 10 Serg. & R. 219; *Bogart v. Nevins*, 6 Serg. & R. 369; *Murphy v. Barron*, 1 H. & Gill, 258; *Guthrie v. Hyatt*, 1 Harring. 447; *Tevis v. Brown*, 3 J. J. Marsh. 175; *Martzell v. Stauffer*, 3 Penn. 398; *Allen v.*

decided, that if A. assign to B. a debt due from C. to A., and C. afterwards pays that debt to A., B. may recover the same from him in an action for money had and received, although the sale by A. to B. was merely that of a *chose in action*. (o)

This action, however, “does not lie for money paid by the plaintiff, which was claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (o¹) express or implied; or extortion, or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances.” (p)

The *form* of the count is, that the plaintiff sues the defendant “for money payable by the defendant to the plaintiff, for money received by the defendant for the use of the plaintiff;” (q) and, to support this count, it is, as a general rule, necessary to prove that the defendant himself, or his agent, (r) *actually received money* for the benefit of the plaintiff, under such circumstances as to create a privity of contract between him and the plaintiff. (s)

Form of count; and what necessary to support.

M’Keen, 1 Sumner, 317; Glass v. Lobdell, Walker (Miss.), 105; Hatten v. Robinson, 4 Blackf. 480; Rathbone v. Stocking, 2 Barb. 135; Wilson v. Sergeant, 12 Ala. 778; Buell v. Boughton, 2 Denio, 91; Knapp v. Hobbs, 50 N. H. 478.]

(o) Smith v. Jones, 6 Jur. 283; and see Tibbits v. George, 5 A. & E. 107, 116.

(o¹) [This action lies against a mere intruder or trespasser, who has collected money which belonged to another; as where a party, having no right to wharfage, has, without authority, collected it, the true owner may sue him in assumpsit for it. O’Conley v. Natchez, 1 Sm. & M. 31.]

(p) Per Lord Mansfield C. J. Moses v. Macferlan, 2 Burr. 1005, 1012; and see

Longchamp v. Kenny, 1 Dougl. 138; Stratton v. Rastall, 2 T. R. 370; Boyter v. Dodsworth, 6 T. R. 681. See 2 Pothier by Evans, 369, 378, 379.

(q) 15 & 16 Vict. c. 76, sched. B.

(r) Coates v. Bainbridge, 5 Bing. 58; Russell on Factors, 96–100.

(s) See Barlowe v. Brown, 16 M. & W. 128; Vaughan v. Matthews, 13 Q. B. 187, 189; Jones v. Carter, 8 Q. B. 134; Cobb v. Becke, 6 Q. B. 930; per Parke J. Baron v. Husband, 4 B. & Ad. 611, 612; [Bloomer v. Denman, 12 Ill. 240; Hutchins v. Gilman, 9 N. H. 359; Carnegie v. Morrison, 2 Met. 396. There need be no privity of contract, except that which results from one man’s having another’s money, which he has not a right conscien-

Where, therefore, the purchaser of a ticket in a Derby *lottery* sold it to the plaintiff, and the horse named in such ticket proved to be the winner, whereby the holder thereof became entitled to a prize in money; it was held that the plaintiff could not maintain an action for money had and received, to recover the amount of the prize from the treasurer of the lottery; for, although he held the money for the benefit of the plaintiff, yet there was no privity between them. (*t*) And so, if money in litigation between two parties is paid over by mutual consent to a trustee or stakeholder, in trust for the party entitled; it can be recovered by the party entitled to it, from the stakeholder only, and not from the other party by whom it was claimed. (*u*)

J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt, signed, "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned; but it did not appear that his intention so to act was known to B., at the time of the payment. B. afterwards refused to pay the money over to the client; and, an action having been brought against him for money had and received, it was held that it did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, — the master, on the other hand, being answerable to the client for the sum received by his clerk, and there being no privity of contract between the present plaintiff and defendant. (*x*)

So where a country attorney, who is engaged in a cause, emotionally to retain, in order to support this action. *Mason v. Waite*, 17 Mass. 563; *Hall v. Marston*, 17 Mass. 579; *Eagle Bank v. Smith*, 5 Conn. 71; *Dickson v. Cunningham*, Mart. & Yerg. 221; *Wiseman v. Lyman*, 7 Mass. 288; *Freeman v. Otis*, 9 Mass. 271; *Carnegie v. Morrison*, 2 Met. 396; *Frost v. Gage*, 1 Allen, 262; *Knapp v. Hobbs*, 50 N. H. 476, 478. An action for money had and received may be sustained by an attorney against the assignee of a judgment, who has collected the amount of it, to recover the amount of the attorney's lien upon such judgment. *Heartt v. Chipman*, 2 Aiken, 162. So, if an attorney, having a demand in his hands for collection, assign it without authority to a third person, and the assignee receives the amount, assumpsit for money had and received lies in favor of the client against the assignee. *Penniman v. Patchin*, 5 Vt. 346.] Various sums, received at different times, upon distinct transactions, may be recovered under one count for money had and received. 2 Wms. Saund. 118, n. (2).

(*t*) *Jones v. Carter*, 8 Q. B. 134.

(*u*) *Ker v. Osborne*, 9 East, 378.

(*x*) *Stephens v. Badcock*, 3 B. & Ad. 354.

plays a London agent ; and the proceeds of the cause are received by the latter in the ordinary course of his business ; there is not, in general, such a privity between the client and the agent, as will entitle the former to recover such proceeds in an action against the agent for money had and received. (*y*)

And so it was held in the following case : A., B., and others, were owners of a ship in the service of the East India Company. B. was managing owner, and he employed C. as his agent for general purposes, and, amongst others, to receive and pay moneys on account of the ship ; and C. kept a separate account in his books with B., as such managing owner. To obtain payment of a sum of money, due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner ; and upon a receipt signed by B. and one of the other owners, C. received, on account of the ship, 2,000*l.* from the East India Company, and placed it to B.'s credit in his books, as managing owner. The part owners having brought an action for money had and received, to recover the balance of that account, it was held that C. had received the money as the agent of B., and was accountable to him for it ; that there was no privity between the other part owners and C. ; and, consequently, that the action was not maintainable. (*z*)

In like manner it was held, that where a party sued one of the members of the provisional committee of a defunct joint stock company, to recover back his deposit, he must show that the defendant was the person, or one of the persons, to whom such deposit was paid. (*a*) And the fact of the plaintiff having paid his money into a bank, which was named in a prospectus which had been circulated by the defendant's sanction, — his name appearing thereon as one of the provisional committee, and as chairman of the committee of management, — was held not to be sufficient to fix the defendant in this action ; provided it appeared that he took no active part in the allotment of the shares, or in the management of the concern. (*b*)

Although, however, it is, in general, necessary that the money sued for in this action should have been originally received by the defendant for the use of the plaintiff ; yet there are cases in which

(*y*) *Robbins v. Fennell*, 11 Q. B. 248.

Q. B. 856 ; 18 L. J. Q. B. 65 ; *Burnside v.*

(*z*) *Sims v. Brittain*, 4 B. & Ad. 375.

Dayrell, 3 Exch. 224, 227.

(*a*) *Watson v. Earl of Charlemont*, 12

(*b*) *Burnside v. Dayrell*, 3 Exch. 224.

the action will lie, where the fact was otherwise. Thus where the defendant, in the character of administrator, received a sum of money which, by the agreement of all parties entitled, was to be applied in repaying the funeral expenses of the intestate's widow, — which had been paid by the plaintiff, — and promised so to apply it; it was held, that the plaintiff might recover against the defendant in an action for money had and received. (*c*) But where the defendant, as the agent of an executor, wrote to a legatee, informing him of the legacy and its amount, and stating that he would remit it in any way the legatee might suggest; and he afterwards remitted the amount of the legacy to the legatee, *minus* a sum deducted for expenses; it was held, that the defendant was not liable to the legatee in an action for money had and received for the sum so deducted, there being no privity between them. (*d*)

It must likewise appear, in general, that the defendant has received *money* or cash, and not merely money's worth. (*e*) Thus, an action for money had and received will not lie, to recover the value of bank or other public stock, improperly transferred to the defendant and still standing in his name; (*f*) or to recover the value of *foreign* securities, unless it appear that the defendant has had an opportunity of converting them into *British* money. (*g*) So it has been held, that this

Defendant must, in general, have received money.

(*c*) *Meert v. Moessard*, 1 M. & P. 8.

(*d*) *Barlow v. Browne*, 16 M. & W. 126.

(*e*) Per Tindal C. J. *Scott v. Miller*, 5 Scott, 11, 16; *Moor v. Pyrke*, 11 East, 52; *Maxwell v. Jamieson*, 2 B. & Ald. 51; *Wharton v. Walker*, 4 B. & C. 163; [*Beardsley v. Root*, 11 John. 464; *Luckett v. Bohannon*, 3 Bibb, 378; *Madison v. Wallace*, 7 J. J. Marsh. 100; *Johnson v. Haggin*, 6 J. J. Marsh. 581. See *Doebler v. Fisher*, 14 Serg. & R. 179; *Dearborn v. Parks*, 5 Greenl. 81; *Hantz v. Sealy*, 5 Binn. 409; *Ralston v. Bell*, 2 Dall. 242; *Morrison v. Berkley*, 7 Serg. & R. 246; *Kearney v. Tanner*, 17 Serg. & R. 94. Bank notes, and any other property received *as money*, will support the action, the same as if money itself had been received. *Mason v. Waite*, 17 Mass. 560; *Ainslie v. Wilson*, 7 Cowen, 562; *Arms v. Ashley*, 4 Pick. 74; *Miller v. Miller*, 7 Pick. 136; *Floyd v. Day*, 3 Mass. 403; *Morrill v. Brown*, 15 Pick. 177; *Payson v.*

Whitcomb, 15 Pick. 212, 216; *Randall v. Rich*, 11 Mass. 494, 498; *Emerson v. Baylies*, 19 Pick. 55, 57; *Hemenway v. Hemenway*, 5 Pick. 389; *Shepard v. Palmer*, 6 Conn. 95. Negotiable notes received by the defendant are often regarded as money. *Beardsley v. Root*, 11 John. 464; *Floyd v. Day*, 3 Mass. 405; *Hemmenway v. Bradford*, 14 Mass. 122; *Willie v. Green*, 2 N. H. 333; *Fairbanks v. Blackington*, 9 Pick. 93; *Payson v. Whitcomb*, 15 Pick. 212. See *Shepard v. Palmer*, 6 Conn. 95; *Clark v. Pinney*, 6 Cowen, 297; *Whitcomb v. Williams*, 4 Pick. (2d ed.) 230, and cases in n. (1); *Tuttle v. Mayo*, 7 John. 132. Real estate may be so regarded for the purposes of this action. *Miller v. Miller*, 7 Pick. 136; see *Randall v. Rich*, 11 Mass. 494; or money constructively received. *Emerson v. Baylies*, 19 Pick. 55.]

(*f*) *Nightingale v. Devisme*, 5 Burr. 2589.

(*g*) *M'Lachlan v. Evans*, 1 Y. & J. 380.

action will not lie against a finder of bank notes, to recover their value. (*h*)

But it would appear that in these, and other cases where the property received by the defendant is saleable, or readily convertible into money, a sale and receipt of money by him will sometimes be presumed, particularly after a great lapse of time, until the contrary be proved. (*i*)

So this action will lie, although the money received was foreign, and not British money. (*k*) And if a stakeholder receive country bank notes *as money*, the amount may be recovered from him under the count for money had and received. (*l*)

It seems, moreover, to be, in general, essential to this action, that the plaintiff should establish a claim to some *particular* or *specific* sum of money, as having been received to his use. (*m*) And if a judgment creditor, who has an *elegit* on the lands of the judgment debtor, sue a receiver for rents received for his use, and there be prior incumbrances on the lands; it is necessary to prove that they have been satisfied, before the receiver can be held liable as for money had and received in respect of the rents. (*n*)

There appear to be cases, however, in which this action will lie, although no money was ever received by the defendant, but where the defendant has merely admitted that he holds value in money, to which the plaintiff is entitled. (*o*) Thus it would seem that this action will lie to recover

Cases where
this is not
necessary.

(*h*) *Noyes v. Price*, 16 Geo. 3, Select Ca. 242.

(*i*) *Longchamp v. Kenny*, 1 Dougl. 137; *Leerey v. Goodson*, 4 T. R. 687; *Whitwell v. Bennett*, 3 B. & P. 559; *Hunter v. Welsh*, 1 Stark. 224; *M'Lachlan v. Evans*, 1 Y. & J. 380. See, however, *Elbourn v. Upjohn*, 1 C. & P. 572. [Where saleable property has been received and not accounted for, the receipt of money for its value may be presumed. *Burnap v. Partridge*, 3 Vt. 144. See *Hatten v. Robinson*, 4 Blackf. 480.]

(*k*) *Ehrensperger v. Anderson*, 3 Exch. 148; S. C. 18 L. J. Exch. 132.

(*l*) *Pickard v. Bankes*, 13 East, 20; *Fox v. Cutworth*, cited in *Spratt v. Hobhouse*, 4 Bing. 173, 179; [*ante*, 902, note (*e*).]

(*m*) *Atkins v. Owen*, 4 A. & E. 819;

Scott v. Miller, 5 Scott, 11; *Harvey v. Archbold*, 3 B. & C. 626.

(*n*) See *Braithwaite v. Watts*, 2 C. & J. 318, 321, 322.

(*o*) See *Hennings v. Rothschild*, 4 Bing. 315; *Spratt v. Hobhouse*, 4 Bing. 173. [Where a party has made himself liable for money, whether he has actually received it or not, the action for money had and received will lie. *Floyd v. Day*, 3 Mass. 403; *Randall v. Rich*, 11 Mass. 494; *Emerson v. Baylies*, 19 Pick. 55; *Appleton v. Bancroft*, 10 Met. 237; *Jackson v. Mayo*, 11 Mass. 152. If an agent, intrusted with property to sell for money, dispose of the property, he is liable in this form of action, whether the sale be actually effected for money or not. *Thompson v. Babcock*, *Brayt*. 24; *Miller v. Miller*, 7 Pick. 136.]

money allowed in account by mistake, as well as to recover money actually paid by mistake. (*p*) Accordingly, where bankers who were authorized to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw, without having any other funds in their hands; it was held, at nisi prius, that the bankers were bound by the entries so made, though they had not been communicated to their employers; and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house. (*q*) And although the court in banc did not agree with this decision, yet they appear to have been of opinion, that if the entries in the bank-books had been communicated to the customer, the action would have lain. (*r*) So where A., being agent for the grantor and the grantee of an annuity, delivered an account to the grantee, by which it appeared that the agent had received from the grantor certain sums on account of the annuity; it was held, that the agent having thus led the grantee to suppose that these moneys had been received, was bound by the account delivered, and was liable for money had and received; unless he could show that he had given credit for these payments by mistake. (*s*)

So where A. was agent for the grantor and grantee of certain annuities, and all payments on account of the annuities passed through his hands, and he charged the grantee a commission upon all such payments; and, on one occasion, he delivered an account to the grantee, in which he gave him credit for half a year's annuity, describing it "as money not yet received;" and debited him with commission upon the same; but in fact it had not been received by A.; and he afterwards became bankrupt: it was held, that his assignees were entitled to be allowed that sum in account by the grantee. So where in one account credit was given to the grantee for certain sums, as money actually received by A., and they had never been received; and in another account, subsequently delivered, the same sums were placed to the debit of the grantee with his assent: it was held, that the assignees of A were entitled to credit for those sums. (*t*)

- (*p*) Per Best C. J. *Bramston v. Robins*, 4 Bing. 11, 15, and see *Skyring v. Greenwood*, 4 B. & C. 281. The contrary was held in *Lee v. Merrett*, 8 Q. B. 820. But see as to this case, per Pollock L. C. B., and Parke B. *Gingell v. Purkins*, 4 Exch. 720, 724, 726.
- (*q*) *Hume v. Bolland*, R. & M. 371.
- (*r*) *Hume v. Bolland*, 1 C. & M. 130.
- (*s*) *Shaw v. Picton*, 4 B. & C. 715.
- (*t*) *Shaw v. Dartnall*, 6 B. & C. 56.

And so, where the plaintiff, a sheriff, had seized goods under a *feri facias* at the suit of the defendant, and had by bill of sale sold and delivered the said goods to the defendant; and, although no money had passed, the bill of sale expressed that the defendant had paid the sum of 256*l.* for the goods; and the other evidence in the case showed, that the sum had been treated between the plaintiff and the defendant as having been paid over to the latter: it was held that the sheriff, — having been compelled to pay the proceeds of the goods to the assignees of the judgment debtor, — might recover the 256*l.* from the defendant in this action. (*u*)

But, in order that an admission by the defendant should render him liable in this action, it must have been made before action brought. (*x*)

It is now quite decided, that the mere existence between two parties of the relationship of trustee and *cestui que trust*, will not entitle the latter to sue the former for money had and received to his use. (*y*) If, therefore, money be received by A., upon trust to make payments of an unascertained amount, and to pay the surplus to B., the latter cannot, while this trust remains open, sue the former for money had and received. (*z*) And so it is said, that when money is intrusted to a factor *ad merchandizandum*, no debt arises until the character of factor is put an end to. (*a*)

This action does not lie in general by *cestui que trust* against trustee.

It has likewise been held, that money paid by A. to B., upon a condition which has not been complied with, cannot be recovered as money had and received to A.'s use. (*b*)

But where money is due in equity, and the trustee states an account concerning it with the *cestui que trust*, it may be recovered at law in this action, or in an action on an account stated. (*c*)

When it does lie in such cases.

There are also many cases in which the plaintiff may waive a *tort* committed by the defendant, and through the medium of

(*u*) *Standish v. Ross*, 3 Exch. 527.

(*z*) *Edwards v. Bates*, 7 M. & G. 590.

(*x*) *Howell v. Batt*, 5 B. & Ad. 504.

(*a*) See per Parke B. *Miller v. Atlee*, 3 Exch. 799, 801; better reported, 13 Jur. 431; and see Russell on Factors, 268.

(*y*) *Bartlett v. Dimond*, 14 M. & W. 49; *Pardoe v. Price*, 16 M. & W. 451; *Bond v. Nurse*, 10 Q. B. 244; *Roper v. Holland*, 3 A. & E. 99; and see per Cur. *Edwards v. Lowndes*, 1 E. & B. 81, 89; *O'Brien v. Lord Kenyon*, 6 Exch. 382; *Mileham v. Eicke*, 3 M. & W. 407.

(*b*) *Hardingham v. Allen*, 5 C. B. 793.

(*c*) Per Crompton J. *Howard v. Brownhill*, 23 L. J. Q. B. 23, 24; *Roper v. Holland*, 3 A. & E. 99.

which he has received money belonging to the plaintiff, and sue for money had and received. (*d*) As where the defendant tortiously takes and retains the plaintiff's money; (*e*) or takes his goods, and sells them, and receives the proceeds; (*f*) or extorts money by detaining them; (*g*) or receives the *fees* of an *office* into which the defendant has intruded. (*h*) And where it appeared that A. had tortiously taken coal from the plaintiff's land, and sold it, and received the money; it was held that, after the death of A., the plaintiff might sue his administrator for this money, as money had and received to his use. (*i*)

It is also laid down, that money had and received lies, if a person, assuming to act as my agent, go and receive my rents from my tenants. (*k*) And in *Hasser v. Wallis*, (*l*) where it appeared that

(*d*) See *Hambly v. Trott*, Cowp. 371; *Clark v. Gilbert*, 2 Scott, 520; *Pratt v. Vizard*, 5 B. & Ad. 808; [*Gilmore v. Wilbur*, 12 Pick. 120; *Jones v. Hoar*, 5 Pick. 290; *Whitwell v. Vincent*, 4 Pick. (2d ed.) 452, n. (2); *Lamb v. Clark*, 5 Pick. 193; *Miller v. Miller*, 7 Pick. 133; *Gardiner Manuf. Co. v. Heald*, 5 Greenl. 381; *Ripley v. Geltson*, 9 John. 201; *Willet v. Willet*, 3 Watts, 277; *Pritchard v. Ford*, 1 J. J. Marsh. 543; *Sanders v. Hamilton*, 3 Dana, 552; *Stocket v. Watkins*, 2 Gill. & J. 326; *Chauncey v. Yeaton*, 1 N. H. 151; *Bigelow v. Jones*, 10 Pick. 161; *O'Conley v. Natchez*, 1 Sm. & M. 31; *Richardson v. Kimball*, 28 Maine, 463; *Dickenson v. Whitney*, 4 Gilman, 406. Tenants in common must join in assumpsit, when a tort to the common property is waived, and they sue in contract. *Gilmore v. Wilbur*, 12 Pick. 120. And when the tort is waived, joint trespassers may be joined in assumpsit. *Gilmore v. Wilbur*, *supra*. The party committing a tort cannot be charged as on an implied assumpsit, the tort being waived, unless some benefit has actually accrued to him. *Webster v. Drinkwater*, 5 Greenl. 319. In this action the plaintiff waives all torts and special damages, and recovers only for the money received; and in most cases he so far confirms the defendant's acts, that he cannot deny his right to

receive it. *Hanna v. Pegg*, 1 Blackf. 181; *Merrick J. in Brown v. Holbrook*, 4 Gray, 102, 103; *Wilder v. Aldrich*, 2 R. I. 518.] And if the tort has once been waived, the defendant cannot afterwards be treated as a wrong-doer. *Lythgoe v. Vernon*, 5 H. & N. 180.

(*e*) *Neate v. Harding*, 6 Exch. 349; 20 L. J. Exch. 250.

(*f*) *Ib.*; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Foster v. Stewart*, 3 M. & S. 191; *Young v. Marshall*, 8 Bing. 43; *aliter*, if under a distress, *Lindon v. Hooper*, Cowp. 414. [See *Higgins v. Brown*, 20 Maine, 332; *Morrison v. Rogers*, 2 Scam. 318. The party, whose goods have been taken and sold, cannot, by waiving the tort, recover in an action for goods sold and delivered. *Brown v. Holbrook*, 4 Gray, 102; *Jones v. Hoar*, 5 Pick. 285; *Elliott v. Jackson*, 3 Wisc. 649. It has, however, been held that the value of the goods taken may be recovered in such case, though not sold, in *Alsbrook v. Hathaway*, 3 Sneed (Tenn.), 454; *Janes v. Buzzard*, 1 Hemp. 240.]

(*g*) *Post*, Division, 11.

(*h*) *Post*, Division, 14.

(*i*) *Powell v. Rees*, 7 A. & E. 426.

(*k*) See *Clarence v. Marshall*, 2 C. & M. 495, 502; and per *Heath J. Lightly v. Clouston*, 1 Taunt. 112, 115.

(*l*) 1 Salk. 28; S. C. 11 Mod. 146. But

the plaintiff, being a *feme sole*, married the defendant Wallis, — who was in truth married to another woman, — and that Wallis made a lease of the wife's land, reserving rent, and received the rents from the tenants; but that the plaintiff, having discovered the former marriage, thereupon brought *indebitatus assumpsit* against Wallis for so much money received to her use; it was held that the action would lie. And although it was objected that Wallis having no right to receive, the tenant was not discharged, and therefore an action lay against the tenant, who had his remedy over against Wallis; the court held, that Wallis “was visibly a husband, and the tenant discharged; at least, that the recovery against Wallis in this action would discharge the tenant, for this would be a satisfaction to the lessor.”

But the title to land, or to an incorporeal hereditament, cannot be tried in this action. ^(l) And, accordingly, where rents are received under an adverse holding or possession; or by a person *claiming title* to land, but having no title; an action for money had and received is not the proper remedy against the party thus wrongfully obtaining such rents. ^(m)

Title to land cannot be tried in this action.

So this action will not lie by one tenant in common against his co-tenant, whom he alleges to have received more than his share of the profits. ⁽ⁿ⁾

But where a tenant, having paid rent to A., was ejected at the suit of a third person, who afterwards recovered mesne profits from him, for the period in respect of which he had paid rent to A.; it

see *Darnton v. Pigman*, Peake Ad. Ca. 114. In that case A., being a bankrupt, continued in possession of his estate, and granted an annuity out of certain premises to B. The tenant in possession paid the rent to B. to prevent a distress; and Lord Kenyon held, that the assignees could not sue B. for money had and received; on the ground that if the tenant paid the money to a person who had no title to receive it, that payment would not be available against the assignees.

^(l) [See *Brigham v. Winchester*, 6 Met. 460; *Haven v. Foster*, 9 Pick. 112; *Codman v. Jenkins*, 14 Mass. 93; *Barker v. Howell*, 1 Serg. & R. 481; *Bigelow v. Jones*, 10 Pick. 165; *Boston v. Binney*, 11 Pick. 1; *Binney v. Chapman*, 5 Pick.

127; *Buell v. Cook*, 4 Cowen, 238; *Wyman v. Hook*, 2 Greenl. 338.]

^(m) *Lindon v. Hooper*, Cowp. 414; *Cunningham v. Laurentz*, 1 Bac. Abr. 260; *Clarence v. Marshall*, 2 C. & M. 495, 502. The court will not, even though the parties consent, allow a question to be tried and decided in this form of action, if it be not applicable to the case; *Ker v. Osborne*, 9 East, 378, 381.

⁽ⁿ⁾ *Thomas v. Thomas*, 5 Exch. 28. [But see 4 Kent, 369, 370; *Henderson v. Eason*, 17 Q. B. 701; *Cochran v. Carrington*, 25 Wend. 409; *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, 9 Mass. 540, note; *Shepard v. Richards*, 2 Gray, 426; and see *Sargent v. Parsons*, 12 Mass. 149.]

was held, that the tenant might recover back such rent from A. in an action for money had and received, he not having set up any title to the premises at the trial. (*o*)

2. We have already slightly noticed the rule, that, in order to maintain the action for money had and received, the plaintiff must in general show that the defendant has received some specific sum for his use. (*p*) And we now observe, further, that it is necessary that the money which, or the goods the proceeds whereof the plaintiff claims, should, either originally or at the time of the action brought, have belonged to him. (*q*) Therefore a mere bailiff or agent cannot maintain this action. (*r*) And where an action was brought in the name of A., against B., on a bill of exchange; but it appeared that C., the drawer of the bill, was the real plaintiff, and that A. had only lent his name, because C. was unwilling that his should appear: it was held that A. could not recover from the attorney in the action, a sum of money paid to him by B. on the settlement thereof, as money had and received to his use. (*s*)

So if an agent be employed by several persons, jointly, to sell goods, or a specific chattel, such as a ship, and he do so and receive the proceeds, one of them cannot sue the agent alone, to recover his proportion of such proceeds. (*t*) And where, under a written authority from two of three executors (who alone had proved the will), the defendant received certain rents due from the tenants of lands in which the testator had a term of years, and gave a receipt for such rents in the name and on account of the two; it was held that the three executors could not sue the defendant, jointly, for the money, — unless it were found by the jury, that the two had contracted with him on account of themselves and the other executor, or generally on account of the estate. (*u*)

But where the defendant was a mere wrong-doer in taking goods, and he afterwards sells them and receives the proceeds; the party from whose possession they were taken may sue for money had and received, to recover the proceeds, without proving

(*o*) *Newsome v. Graham*, 10 B. & C. Ross, 3 Exch. 527, 532; *Thurston v.* 234; and see *Barber v. Brown*, 1 C. B. Mills, 16 East, 274.

N. S. 121; *Cripps v. Reade*, 6 T. R. 606.

(*p*) *Ante*, 903.

(*q*) See *Vaughan v. Matthews*, 13 Q. B.

187; 18 L. J. Q. B. 191; *Standish v.*

(*r*) *Harding v. Hall*, 10 M. & W. 42.

(*s*) *Clark v. Dignam*, 3 M. & W. 478.

(*t*) *Hatsall v. Griffith*, 2 C. & M. 679.

(*u*) *Heath v. Chilton*, 12 M. & W. 632.

any title to the goods beyond mere possession. And if the plaintiff be entitled to the money, the action lies, though the money received by the defendant was not the identical money produced by the sale of the goods. (*v*) So where the trustee of a bill of exchange, sued thereon for the benefit of A.; and, the defendant in the action having escaped, the trustee recovered against the sheriff: it was held that A., the *cestui que trust*, might maintain an action for money had and received against the trustee, to recover the sum obtained from the sheriff, allowing the trustee his costs and expenses. (*x*)

So where A., as agent for B., who was factor for C., consigned goods to C. in his, A.'s name; and C. in former transactions of a like kind had dealt with A. as the shipper of the goods consigned, and had treated the proceeds thereof as his: it was held that A. was the proper party to sue C. in this form of action, to recover the proceeds of such consignment; and that C. could not defend himself in such action, by showing that the goods were really the goods of his own factor, unless he could also show that A. and B. had practised a fraud, from which he, C., had suffered an injury. (*y*)

And the action for money had and received will lie by an administrator against a stranger, for debts due to the intestate, which have been received by the latter between the time of the death of the intestate and the grant of administration; as well as for money which such stranger may have received from the sale of the intestate's goods. (*z*)

So, this action will lie at the suit of the assignees of a bankrupt, for money received by the defendants after the bankruptcy, or before the bankruptcy by way of fraudulent preference. (*a*) And where A. and B. were partners, and B. fraudulently indorsed to C., in payment of a private debt, certain bills belonging to the partnership, C. being aware of the fraud: it was held that, — B. having afterwards become bankrupt, — his assignees might disaffirm the transaction as a fraudulent preference, and join with A. in an action for money had and received against C., to recover the proceeds of such bills. (*b*)

(*v*) *Allanson v. Atkinson*, 1 M. & S. 583.

(*x*) *Randall v. Bell*, 1 M. & S. 714.

(*y*) *Scott v. Crawford*, 4 M. & G. 1031, 1043.

(*z*) *Welchman v. Sturgis*, 13 Q. B. 552; 18 L. J. Q. B. 211.

(*a*) Per Parke B. *Pennell v. Aston*, 14 M. & W. 415, 417.

(*b*) *Heilbut v. Nevill*, L. Rep. 4 C. P. 354; (in Cam. Scac.), 5 Ib. 478.

3. This action is not in general maintainable against a mere *bearer* of money from one person to another. (*c*) Thus, Against whom it lies in general. it should be brought against the principal; (*d*) and not against a mere receiver or collector; (*e*) or against an agent or other party who has paid over the money to another, with the assent, (*f*) or according to the directions of the party who deposited it with him; (*g*) or against a clerk, or an attorney who, without paying it over, received it expressly under the authority, and for and in the name of his employer. (*h*)

So, where the plaintiff agreed with K. & Co., that certain dividends should be received by them on his account from his broker, and that the broker should pay such dividends to them through the bank of D. & Co.: it was held that, so soon as the money was paid to D. & Co., it was paid to K. & Co.; and that, — the latter firm having stopped payment, — the plaintiff could not recover the same from D. & Co. in this action. (*i*)

But it has been held that, even if there be a payment to A. expressly as the agent of B., for the purpose of redeeming Against agents. goods wrongfully detained by B., and a receipt by A. expressly for B., the party who paid this money has still a right of action against A. for money had and received. (*k*) And this action will lie against the agent in such a case, although he may have actually paid the money over to his principal. (*l*)

But this action cannot be maintained against a churchwarden, to recover back dues which, previous to the commencement of the action, had been paid over by him to the trustees of a chapel for whom they were received. (*m*)

So, where goods belonging to the plaintiff were seized by an officer of excise; and the plaintiff, by direction of the commissioners, paid a sum of money to the defendant, a receiver of the excise, in order to redeem them: it was held that, even if the seizure proved

(*c*) *Coles v. Wright*, 4 Taunt. 198; recognized by Lord Tenterden C. J. *Tope v. Hockin*, 7 B. & C. 110.

(*d*) See *Goodall v. Lowndes*, 6 Q. B. 464.

(*e*) *Sadler v. Evans*, 4 Burr. 1985; *Greenway v. Hurd*, 4 T. R. 553, 554, 555, notes.

(*f*) *Hurley v. Baker*, 16 M. & W. 26.

(*g*) *Buller v. Harrison*, Cowp. 556; *Whitehead v. Evans*, 5 Moore, 105, 115.

(*h*) *Baron v. Husband*, 4 B. & Ad. 611.

(*i*) *Williams v. Deacon*, 4 Exch. 397.

(*k*) Per Cur. *Smith v. Sleep*, 12 M. & W. 585, 588; *Parker v. Bristol & E. Railway Company*, 6 Exch. 702, 707; and see *Steele v. Williams*, 8 Exch. 625.

(*l*) *Snowdon v. Davis*, 1 Taunt. 359; *Oates v. Hudson*, 6 Exch. 346. [See *Ripley v. Geltson*, 9 John. 202; *Elliott v. Swartwout*, 10 Peters (U. S.), 137.]

(*m*) *Horsfall v. Handley*, 8 Taunt. 136.

to have been invalid, the plaintiff could not recover the money so paid to the defendant, in an action for money had and received; inasmuch as it appeared that he had paid the same over to the commissioners, before receiving notice of the intention of the plaintiff to dispute the validity of the seizure. (*n*) And where an arbitrator received money in dispute as a deposit, until the question could be decided; and paid it over according to his award, to the person whom he considered entitled to it: it was held that, although the person who deposited the money had previously committed an act of bankruptcy, the assignees could not sue the arbitrator for money had and received, he being a mere gratuitous holder or carrier of the money, and having paid it over *bonâ fide* without knowledge of the act of bankruptcy. (*o*)

So, if money be paid *by mistake* to an agent, and be paid over by him to his principal, without notice of the mistake, money had and received will not lie against the agent, at the suit of the payer. And the same rule holds where, although the money has not been actually paid over by the agent, he has given credit in account to his principal for it, and the account has been stated and settled between them on that footing. (*p*) But the mere fact of passing such money to the principal's credit in an open account; or of making rests, without any new credit given, fresh bills accepted, or further sums advanced for the principal in consequence thereof, is not equivalent to a payment of it over. (*q*)

Nor, even if the money has been paid over by the agent, will he be protected, unless such payment was made *bonâ fide*, without notice of the plaintiff's claim. (*q*¹) Where, therefore, an attorney, who was also an auctioneer, received a deposit on property which he had sold by auction; and, after queries raised on the title and before they were answered, paid over the deposit to his principal; and on the deposit being demanded back by the buyer, he answered that his principal would not consent to return it, and would enforce

(*n*) *Atlee v. Backhouse*, 3 M. & W. 633, 648.

(*o*) *Tope v. Hockin*, 7 B. & C. 101.

(*p*) *Holland v. Russell*, 1 B. & S. 424; S. C. (in Cam. Scac.) 4 Ib. 14.

(*q*) *Buller v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 344; *Peto v. Blades*, 5 Taunt. 657; *Edwards v. Hodding*, Ib. 815.

(*q*¹) [See *Mowatt v. M'Clelan*, 1 Wend. 173; *Wharton v. Hudson*, 3 Rawle, 390; *Frye v. Lockwood*, 4 Cowen, 454; *Hearsey v. Pruyn*, 7 John. 179; *Garland v. Salem Bank*, 9 Mass. 408; *Fowler v. Shearer*, 7 Mass. 14; *Dickens v. Jones*, 6 Yerger, 483; *Elliott v. Swartwout*, 10 Peters, 137; *Pool v. Adkisson*, 1 Dana, 117.]

the contract : it was held, that the buyer might recover the deposit from the auctioneer, as money had and received to his use : first, because the defendant, as attorney, *had notice* that the title was not completed before he paid over the money ; and, secondly, because he had *misled* the plaintiff, by not saying he had paid it over. (*r*)

So, tolls wrongfully taken and withheld by a corporation aggregate, may be recovered from them by the proprietor, in an action for money had and received. (*s*)

Against corporations.

4. In *Tatlock v. Harris*, (*t*) Buller J. put this case : Suppose A.

When it lies to recover a debt, transferred by creditor's order on his debtor, to pay plaintiff.

owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them that A. shall pay C. the 100*l.* ; B.'s debt is extinguished, and C. may recover that sum against A. And this doctrine, — which affords an exception to the general rule, that a debt cannot be assigned at law so as to enable the assignee to

sue in his own name, (*u*) — has been recognized in subsequent decisions. It would appear, however, that in such a case as the above, it is necessary, in order to enable C. to sue A. for money had and received, that the debt originally due to C. from B., should be extinguished by the new arrangement ; (*x*) and that such debt is not extinguished, unless there be a communication between all the parties, and an express agreement by the plaintiff to accept the defendant only as his debtor. (*y*)

(*r*) *Edwards v. Hodding*, 5 Taunt. 815, cited in *Horsfall v. Handley*, 8 Taunt. 136 ; and approved of by Lord Tenterden in *Gray v. Gutteridge*, 3 C. & P. 40, 41. [In actions against agents for money voluntarily paid by mistake, the true distinction is, that where the agent has paid the money over to his principal in good faith, he is not personally liable ; but where he has not paid over such money, or before such payment, he has notice of the mistake, and is required not to pay it, then he is personally responsible, although payment to his principal may have been made. *Law v. Nunn*, 3 Kelly, 90 ; *Hearsey v. Pruyn*, 7 John. 182 ; *La Farge v. Kneeland*, 7 Cowen, 456 ; *Mowatt v. McClellan*, 1 Wend. 173.]

(*s*) *Hall v. Mayor &c. of Swansea*, 5 Q. B. 526. When this action will lie against the members of a firm, to recover

money which was received by one of their number after the dissolution thereof, see *Armitage v. Winterbottom*, 1 Scott N. R. 23.

(*t*) 3 T. R. 180 ; *Wilson v. Coupland*, 5 B. & Ald. 228.

(*u*) *Fairlie v. Denton*, 8 B. & C. 395.

(*x*) *Cuxon v. Chadley*, 2 B. & C. 591 ; *Wharton v. Walker*, 4 B. & C. 163. See *Ward v. Evans*, 2 *Ld. Raym.* 928.

(*y*) See *Noble v. National Discount Company*, 5 H. & N. 225 ; *Liversidge v. Broadbent*, 4 Ib. 603 ; *Wilson v. Coupland*, 5 B. & Ald. 228 ; *Cuxon v. Chadley*, 3 B. & C. 591. See particularly, *Wharton v. Walker*, 4 B. & C. 163, 166. [See title "Novation" ; *Heaton v. Angier*, 7 N. H. 397 ; *Butterfield v. Hartshorn*, 7 N. H. 345 ; *Hall v. Marston*, 17 Mass. 575 ; *Warren v. Bachelder*, 15 N. H. 129 ; *Bigelow*

In *Fairlie v. Denton*, (z) it was held, that if there be a defined and ascertained debt due from A. to B., and a debt to the same or a larger amount be due from C. to A.; and the three agree that C. shall be B.'s debtor instead of A.; and C. promise to pay B.; the latter may sue C.; but that, in such action, the plaintiff must show that, at the time when the defendant promised to pay him, there was an ascertained debt due from A. to him, the plaintiff. But, according to a more recent case, (a) if S. be indebted to I.; and — G. being indebted to S. — S. request G. to pay I. whatever may be due from G. to S.; and G. promise to do so when the amount is ascertained; and, after the amount has been ascertained and before it is paid, S. becomes bankrupt; this operates as an equitable assignment to I. of the debt due from G. to S., which binds the assignees of the latter.

So, a person cannot revoke an authority to his debtor to pay a debt to a third party, the creditor of the former, after the debtor has given a pledge to such third party that he will pay the money according to the authority. (b) And if the debtor afterwards pay the debt to the original creditor, such third party may, it seems, recover the same from the latter in an action for money had and received. (c)

v. Davis, 16 Barb. 561.] It has been held, however, that in order to take the debt out of the order and disposition of the creditor on his becoming bankrupt, it is not necessary that formal notice should be given to the debtor; and that if it be shown that the fact of the assignment having been made was communicated to him, that will suffice. *Tibbets v. George*, 5 A. & E. 107, 115; *Smith v. Smith*, 2 C. & M. 231. What is not such an extinguishment of a debt due to two partners dissolving partnership, as will render the remaining partner only the creditor; *Biggs v. Fellows*, 8 B. & C. 402. These promises to pay the plaintiff, instead of the original creditor, need not be in writing. *Hodgson v. Anderson*, 3 B. & C. 842; *Crowfoot v. Gurney*, 9 Bing. 372; *Andrews v. Smith*, 2 Cr., M. & R. 627.

(z) 8 B. & C. 395.

(a) *Crowfoot v. Gurney*, 9 Bing. 372.

See, also, *Belcher v. Oldfield*, 6 Bing. N. C. 102.

(b) *Hodgson v. Anderson*, 3 B. & C. 842; *Robertson v. Fauntleroy*, 8 Moore, 10; *Gibson v. Minet*, R. & M. 68, 71. Effect of transfer in banker's books, *Gibson v. Minet*, R. & M. 68; S. C. 1 C. & P. 247; 2 Bing. 7. See, also, *Buller v. Harrison*, Cowp. 565. A. being indebted to B., in order to discharge the debt, executed to B. a power of attorney authorizing him to sell certain lands of A.: held, that this could not be revoked. *Gausson v. Morton*, 10 B. & C. 731. So where the drawer of an accommodation bill handed money to the acceptor for the purpose of meeting the bill, it was held that the bankruptcy of the drawer did not revoke the acceptor's authority, to apply the money in satisfaction of the bill. *Yates v. Hoppe*, 9 C. B. 541.

(c) See *Pooley v. Goodwin*, 4 A. & E. 94.

Whether the common count for money had and received is the proper form of remedy in such cases as the above, if the defendant was not originally indebted to the third party for money had and received; or whether the plaintiff should declare specially on the defendant's promise, is a question on which the authorities are divided. The case of *Israel v. Douglas* (*d*) is an authority in favor of the common count. And Lord Ellenborough is reported (*e*) to have said that, with respect to *Israel v. Douglas*, "he did not feel a difficulty, because it was an accepted transfer; it was money had and received by the operation of the agreement." It is observable, however, that Wilson J. differed from the other judges in *Israel v. Douglas*; and in *Taylor v. Higgins*, (*f*) it was stated by Lawrence J. that the case had since been mentioned in the king's bench, and was not approved of upon that point. To the same effect is the subsequent case of *Wharton v. Walker*. (*g*) And we may, therefore, conclude that, where the original debt due from the defendant was not for money had and received, it is the safer course to declare specially on the contract. (*h*)

Or money which a principal orders his agent to pay the plaintiff.

5. A direction to a banker or other agent, to hold the money of the principal at the disposal of a third party is, at law, (*i*) revocable until it is executed either by actual delivery of the money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former. (*k*) And until the agent does enter into such engagement, the remittee cannot sue him for money had and received. (*l*)

(*d*) 1 H. Bl. 239. A., being indebted to B. for brokerage, and B. indebted to C. for money lent, B. gives an order to A. to pay C. the sum due from A. to B. as a security; on which C. lends B. a further sum; and the order is accepted by A. On the refusal of A. to comply with the order, C. may maintain an action *for money had and received* against him. Ib.

(*e*) *Williams v. Everett*, 14 East, 587, n. (*a*).

(*f*) 3 East, 171.

(*g*) 4 B. & C. 163. See particularly, per Littledale J. Ib. 166; *Fairlie v. Denton*,

8 B. & C. 398; *Hennings v. Rothschild*, 4 Bing. 315.

(*h*) See, also, *Blackledge v. Harman*, 1 M. & R. 344, 346.

(*i*) But it seems to be otherwise in equity. *Burn v. Carvalho*, 4 Myl. & Cr. 690, 702.

(*k*) Per Parke B. *Brind v. Hampshire*, 1 M. & W. 365, 372; *Gibson v. Minet*, R. & M. 68; *Carey v. Adkins*, 4 Camp. 93; *Hankey v. Hunter*, Peake Ad. Ca. 107. See *Scott v. Porcher*, 3 Mer. 652.

(*l*) *Malcolm v. Scott*, 5 Exch. 601.

Thus, where bankers received bills from their foreign correspondents, with directions to pay the amount to the plaintiff; but, on being applied to by him, they refused so to do, and declined to act upon the orders given; it was held that, although the bankers afterwards received the amount of the bills, an action for money had and received was not maintainable against them, to recover the same. (*m*) This doctrine was recognized in *Wedlake v. Hurley*. (*n*) It there appeared that A. remitted to B. a bank bill, indorsed "pay to the order of B., under provision for my note in favor of C., payable at the house of B., on 1st January, 1830;" B. received the proceeds of the bill, and refused to pay them over to C.; and, in an action by C. for money had and received, it was held that B. was not liable to C., because B. had never assented to hold the bill or money to the use of C. And the same principle has been acted upon in many later cases. (*o*)

But if the agent once enter into a binding engagement with the remittee, to hold the money for his use, the latter may maintain this action against him. (*p*) And it is said, that if a debtor send money to a general agent for the creditor, the agent, as soon as he receives it, will be accountable for it to the creditor, as money had and received to his use. (*q*)

And the principal cannot, even as against his agent, rescind an order to pay money to a third person, if such third person be induced to make advances on the faith thereof, and the money be in fact appropriated and set apart, by the terms of the order, as a security to the third party. (*r*)

But where a banker received a sum of money, the property of

(*m*) *Williams v. Everett*, 14 East, 582; *Stewart v. Fry*, 7 Taunt. 339; *Gibson v. Minet*, R. & M. 68.

(*n*) 1 C. & J. 83. Attorney when not liable; *Baron v. Husband*, 4 B. & Ad. 611.

(*o*) *Brind v. Hampshire*, 1 M. & W. 365; *Malcolm v. Scott*, 5 Exch. 601; *Howell v. Batt*, 5 B. & Ad. 504; *Baron v. Husband*, 4 B. & Ad. 611. [See *Hall v. Marston*, 17 Mass. 579; *Carnegie v. Morrison*, 2 Met. 396; *Tiernan v. Jackson*, 5 Peters, 580. An action for money had and received does not lie against a third person who has had funds deposited with him, unless the debtor, who has depos-

ited, has lost all control over the fund. *Seaman v. Whitney*, 24 Wend. 260. But see *Carnegie v. Morrison*, 2 Met. 396.]

(*p*) *Griffin v. Weatherby*, L. Rep. 3 Q. B. 753; *Brind v. Hampshire*, 1 M. & W. 345; *Walker v. Rostron*, 9 M. & W. 411; *Fruhling v. Schroeder*, 2 Scott, 143; and see *Patorni v. Campbell*, 12 M. & W. 277, 278; *Cobb v. Becke*, 6 Q. B. 930, 936; [*Wyman v. Smith*, 2 Sandf. 331; *Draughan v. Bunting*, 9 Ired. 10.]

(*q*) Per *Patterson J.* *Lilley v. Hayes*, 5 A. & E. 548, 550.

(*r*) *Fisher v. Miller*, 1 Bing. 150; *Robertson v. Fauntleroy*, 8 Moore, 10. See *Hare v. Richards*, 5 M. & P. 35.

several persons, from their agent, — who was charged to divide it amongst them in distinct proportions ; and the banker, after part of the money had been drawn out and distributed by the agent, refused to account to an individual proprietor for the residue, in which he knew that such proprietor had an interest ; it was held, that the banker was not liable to the latter in an action for his share. (s)

If money be placed in an agent's hands, to be paid to a third person on the happening of a certain contingency, the action for money had and received will not lie until such contingency has happened. (t)

If goods be consigned by the owner to W., with directions to pay over the net proceeds to B. ; and W. employs a broker to sell them, who receives the money : B. can recover from the broker the proceeds only, subject to the same deductions and allowances as W. was entitled to make in account with the consignor. (u)

The agent of a regiment, appointed by the colonel under the usual power of attorney, is the agent of the latter, and bound to account to him for money received from government ; although such money was eventually payable, not only to the colonel, but to other officers and persons in the regiment. (x)

6. The common count for money had and received lies by a principal against his agent, to recover moneys collected and received by the latter for his use ; or the proceeds of goods sold by the agent for his principal, and which proceeds have come to the hands of the agent. (x¹)

By principal
against
agent.

(s) *Pinto v. Santos*, 5 Taunt. 447.

(t) *Sewell v. Raby*, 6 M. & W 22 ; *Wilkinson v. Godefroy*, 9 A. & E. 356.

(u) *Blackburn v. Kymer*, 5 Taunt. 584.

(x) *Knowles v. Maitland*, 4 B. & C. 183.

(x¹) [If an agent, who has no authority to sell on credit, take a note payable to himself, or if he unreasonably neglect to collect the money due on a note taken by him, he will be answerable to his principal for the amount in an action for money had and received. *Hemenway v. Hemenway*, 5 Pick. 389 ; 2 Kent, 622, 623 ; *Jackson v. Baker*, 6 Cowen, 183, and n. (a). If a factor, to whom goods have been consigned for sale, unreasonably neglect to render an

account of sales, an action may be maintained against him for the proceeds, without a previous demand. *Langley v. Sturtevant*, 7 Pick. 214. See *Wait v. Gibbs*, 7 Pick. 146 ; *Harvey v. Turner*, 4 Rawle, 223 ; *Brown v. Arnott*, 1 Miles, 139 ; *Witherup v. Hill*, 9 Serg. & R. 11 ; *Chapman v. Shaw*, 5 Greenl. 59 ; *Cooley v. Betts*, 24 Wend. 203. Where a person receives rents and profits of real estate, which he holds in trust for another, and to the use and improvement of which the *cestui que trust* is entitled, the amount of the rents and profits so received, whether in money or in specific articles at an estimated price, may be recovered by the *cestui*

But in these cases, the agent is entitled to a set-off for his commission, as well as for advances made, or expenses incurred by him in the course of his agency. (*y*)

Where, however, the agent has received the goods of his principal to sell for him, and there is no proof that they have been sold, or that, if sold, the agent has received the proceeds, (*z*) the common count does not lie; but the action must be special, for not accounting. (*z*¹)

And an action does not lie against an agent for not accounting, until after a demand made of an account. (*a*)

If an agent receive a sum of money from his principal, with instructions to apply it to a particular purpose, and he refuses to apply it to that purpose, or to account for the same, an action for money had and received will lie against him. (*b*) So this action will lie, if he misappropriates the money, or applies it to the particular purpose after his authority so to apply it is countermanded. (*c*)

But mere neglect on the part of the agent, to apply money according to his instructions, will not render him liable to this action. (*d*)

So, if an agent receive money, the proceeds of a sale, and, on the contract of sale being rescinded by the vendee, by reason of a fraud on the part of the principal, which was unknown to the agent, the latter pays back such money to the vendee; the principal cannot afterwards recover it from the agent in an action for money had and received. (*e*)

que trust in an action for money had and received. *Arms v. Ashley*, 4 Pick. 71. Where a factor sells goods on credit under a *del credere* commission, general *indebitatus assumpsit* will lie against him in favor of the principal, after the expiration of the term of credit, to recover the proceeds of the goods. *Swan v. Nesmith*, 7 Pick. 320; 2 Kent, 624. But an action for *goods sold and delivered* will not lie against an agent, factor, or consignee, even after a special demand has been made to pay or account for goods intrusted to him to dispose of and account for. *Brown v. Holbrook*, 4 Gray, 102, 104; *Ayres v. Sleeper*, 7 Met. 45. See *Ashley v. Root*, 4 Allen, 504.]

(*y*) *Dale v. Sollet*, 4 Burr. 2133; *Russell on Factors*, 275.

(*z*) It was held by Lord Ellenborough,

that if the agent refused to account for the proceeds within a reasonable time, the receipt thereof by him may be presumed. *Hunter v. Welsh*, 1 Stark. 224.

(*z*¹) [See *Brown v. Holbrook*, 4 Gray, 104.]

(*a*) See *Topham v. Braddick*, 1 Taunt. 572.

(*b*) *Ehrensperger v. Anderson*, 3 Exch. 148, 159; 18 L. J. Exch. 132, 135; *Buchanan v. Findlay*, 9 B. & C. 738. [See *Murphy v. Barron*, 1 H. & Gill 258.]

(*c*) *Taylor v. Lendey*, 9 East, 49; and see *Fletcher v. Marshall*, 15 M. & W. 755; *Parry v. Roberts*, 3 A. & E. 118.

(*d*) *Ehrensperger v. Anderson*, 3 Exch. 148; *Duncan v. Skipwith*, 2 Camp. 68.

(*e*) See *Murray v. Mann*, 2 Exch. 538.

If money be received by an agent for his principal, in the course of an illegal transaction to which both are parties, the latter cannot sue the former for money had and received. (*f*) But a principal who has lodged money in his agent's hands for an illegal purpose, may, before the money is so applied, countermand the agent's authority, and recover the money back in this action. (*g*)

And an agent who receives money for the use of his principal, cannot defend an action by the latter for money received to his use, on the ground that such money was paid to him, the agent, by a third party, under an illegal contract between the latter and the plaintiff. (*h*)

Nor can an agent, in general, dispute the title of his principal in this action. (*i*) And therefore, where a ship, which originally belonged to one of two partners, had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, *as agent for both partners*, insured the ship and freight, charging them with the premiums, &c. ; and, on a loss happening, received the money from the underwriters ; it was held, that he was accountable to the assignees of the surviving partner, for the surplus after payment of his own debt ; and not to the executor of the deceased partner, to whom the ship originally belonged. (*k*)

But this rule is not of universal application. And, accordingly, where an action was brought by a principal against his agent, to recover the proceeds of certain goods which the latter had sold on his account ; the agent was permitted to prove as a defence, that the goods in question had come to the possession of the principal by collusion with a third person, who had no title to them ; and that, before he had paid over the proceeds thereof to his principal, the person really entitled to the goods had given him, the agent, notice of his claim. (*l*)

So the agent may set up the *jus tertii* in answer to an action for money received to the use of his principal, wherever he is able to

(*f*) *Farmer v. Russell*, 1 B. & P. 296 ; *Hastelow v. Jackson*, 8 B. & C. 224. See *Nicholson v. Gooch*, 5 E. & B. 999. *Griffith v. Young*, 12 East, 513.

(*g*) *Taylor v. Lendey*, 9 East, 49.

(*i*) See *Tassell v. Cooper*, 9 C. B. 509.

(*h*) *Bone v. Ekless*, 6 H. & N. 925 ; (*k*) *Dixon v. Hamond*, 2 B. & Ald. 310 ; *Bousfield v. Wilson*, 16 M. & W. 185 ; and see *Crosskey v. Mills*, 1 Cr., M. & R. *Tenant v. Elliott*, 1 B. & P. 3 ; *Farmer v. Russell*, 1 B. & P. 296 ; per *Bayley J.* 298 ; *White v. Bartlett*, 9 Bing. 378.

(*l*) *Hardman v. Wilcock*, 9 Bing. 382.

show that he defends the action upon the right and title, and by the authority of such third person. (*m*)

But he cannot set up the *jus tertii*, merely because an adverse claim has been made upon him, which might entitle him to relief under an interpleader. (*n*) And, *a fortiori*, if the true owner of the goods, — although aware of the circumstances under which the principal became possessed of them, — makes no claim, or abandons his claim thereto, the agent will not be allowed to set up the title of such owner, in answer to an action by the principal for the proceeds of the goods. (*o*)

7. Before the statute 8 & 9 Vict. c. 109, it was held, that if two persons respectively deposited money in the hands of a *stakeholder*, subject to the event of a *legal* wager, no part of the amount so deposited could be recovered from him, except by the winner of the wager. (*p*) For a stakeholder is the agent of both parties, or rather their trustee; and, accordingly, where the stake was deposited upon a *legal* wager, it was held not to be competent to one party to rescind the agreement, and claim his stake from the holder, as if the latter had been *his* agent only, as regarded his stake or proportion of the money deposited. (*q*) But where the wager was *illegal*, either party, even the loser, might recover from the stakeholder the money he had deposited, whether the wager or event had been decided or not; provided he demanded the return of his stake, before the money had been actually *paid over* after the event to the winner. (*r*)

(*m*) *Biddle v. Bond*, 6 B. & S. 225.

(*n*) *Ib.*

(*o*) *Betteley v. Reed*, 4 Q. B. 511.

(*p*) *Brandon v. Hibbert*, 4 Camp. 37; *Bland v. Collett*, *Ib.* 157. And the party must be the winner, according to the terms of the wager itself. *Brown v. Overbury*, 11 Exch. 715.

(*q*) *Emery v. Richards*, 14 M. & W. 728; *Marryat v. Broderick*, 2 M. & W. 369, overruling *Eltham v. Kingsman*, 1 B. & Ald. 683.

(*r*) *Gatty v. Field*, 9 Q. B. 431; *Hastelow v. Jackson*, 8 B. & C. 221; and see *Hodson v. Terrill*, 1 C. & M. 797. As to the case of *Hastelow v. Jackson*, see observations of the court of exchequer in *Mear-*

ing v. Hillings, 14 M. & W. 711, 712. [See *Ball v. Gilbert*, 12 Met. 397, 402-404; *McKee v. Manice*, 11 Cush. 358-361; *Wood v. Wood*, 2 Murph. 172; *Forrest v. Hunt*, 2 Murph. 458; *Livingston v. Wootan*, 1 Nott & McCord, 178; *Perkins v. Eaton*, 3 N. H. 152; *App v. Corgell*, 3 Penn. 494; *Williams v. Cubarras*, *Martin*, 29; *Perkins v. Hyde*, 6 Yerger, 288; *Vischer v. Yeates*, 11 John. 23; *Jacobs v. Walton*, 1 Harring. 496; *Stacy v. Foss*, 19 Maine, 335; *Rust v. Gott*, 9 Cowen, 169; *McCullum v. Gourlay*, 8 John. 147; *Like v. Thompson*, 9 Barb. 315; *Humphreys v. Magee*, 13 Mis. 435; *O'Maley v. Reese*, 6 Barb. 758. And where the money has been demanded, in

And it has been decided, that the statute 8 & 9 Vict. c. 109, s. 18, — which avoids contracts by way of gaming or wagering, and prohibits the maintenance of actions for the recovery of money deposited in the hands of a stakeholder to abide the event of any wager, — does not preclude a party, who repudiates the wager before the event is ascertained, from recovering from the stakeholder the amount of his deposit. (*s*)

But in such cases, the mere bringing of an action is not a sufficient demand, to entitle the party to recover his stake. (*t*)

If A. deposit money in the hands of a stakeholder, until the extent of a demand which B. has upon A. can be ascertained; the stakeholder cannot legally pay the amount to B. upon his indemnity, without the consent of A., before the claim upon the latter is ascertained; and if the stakeholder do so, A. may maintain an action for money had and received against him, without reference to B.'s demand. (*u*)

So, where a deposit is paid to an auctioneer merely as a stakeholder, and the payment thereof to the vendor is to depend on his making out a good title to the property sold; the vendee may, on the vendor failing to make out such title, recover the deposit from the auctioneer, without giving him notice that he has rescinded the contract. (*x*)

But if a check be deposited with a stakeholder, and he gets it cashed, this is not such a breach of his duty as will render him liable to an action for money had and received, unless it appear that the parties had agreed not to treat the check as money. (*y*)

8. Where money has been deposited or paid on a contract, and, before any benefit has been derived by the payer, or any part of the contract has been performed by the other party, the consideration *wholly* fails, an action may be maintained upon the com-

such case, of the stakeholder, and he still pays over the same money deposited with him to the winner, it may be recovered by the loser of the winner, to whom it has been so paid, in an action for money had and received. *McKee v. Manice*, 11 Cush. 357. See, also, *Ball v. Gilbert*, 12 Met. 397; *Sampson v. Shaw*, 101 Mass. 150, 151. See Rev. Sts. Mass. c. 50, § 12; Gen. Sts. c. 85, § 1, under which it was held, that one who has lost and volun-

tarily paid money to the winner of a wager in a dog-fight, might recover it back in an action for money had and received. *Grace v. McElroy*, 1 Allen, 563.]

(*s*) *Varney v. Hickman*, 5 C. B. 271; *Martin v. Hewson*, 10 Exch. 737.

(*t*) *Gatty v. Field*, 9 Q. B. 431.

(*u*) *Cowling v. Beachum*, 7 Moore, 465.

(*x*) *Duncan v. Cafe*, 2 M. & W. 244.

(*y*) *Wilkinson v. Godefroy*, 9 A. & E. 536.

mon count to recover the money so deposited or paid. (*y*¹) Thus, if the purchaser of an estate by auction or private contract, pay a sum of money as a deposit, or in part of the purchase-money, and a good title cannot be made out according to the contract; or if, in such a case, neither party be ready to complete the contract at the stipulated time, but each is in default, the money so paid may be recovered under the common count. (*z*) So, where a sum of money has been deposited

To recover money paid on a consideration which has failed.

(*y*¹) [Where a party receives money in advance, on a contract which he has no authority to make, and afterwards refuses to fulfil the contract, the other party may recover back the money in an action for money had and received. *Dill v. Wareham*, 7 Met. 438. So, in any case, where money is advanced upon an executory contract, which the contracting party fails to perform, it is in the election of the other party to treat the contract as rescinded, to disaffirm it, and recover back his money, as money paid upon a consideration which has failed. *Shaw C. J.* in *Hill v. Rewee*, 11 Met. 271, 272; *Dutch v. Warren*, 1 Strange, 407; *S. C.* 2 Burr. 1010; *Brown v. Harris*, 2 Gray, 359; *Wheeler v. Board*, 12 John. 363; *Briggs v. Vanderbilt*, 19 Barb. 222. The rule was even more broadly stated by *Parker C. J.* in *Griggs v. Austin*, 3 Pick. 20, viz.: "Where money is paid by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment, and the thing stipulated to be done is not performed, the money may be recovered back." See *Carter v. Carter*, 14 Pick. 424; *Harrison v. Chilton*, 5 Yerger, 293; *Lyon v. Annable*, 4 Conn. 350; *Brown v. Harris*, *supra*; *Appleton v. Chase*, 19 Maine, 74. Money paid on an agreement, void by the statute of frauds, which the defendant cannot or will not complete, may be recovered back. *Buck v. Waddle*, 1 Ham. 363; *Gillet v. Maynard*, 5 John. 85; *Rice v. Peet*, 15 John. 503; *Thompson v. Gould*, 20 Pick. 134; *Lane v. Shackford*, 5 N. H. 133; *Geer v. Geer*, 18 Maine, 16; *Kidder v. Hunt*, 1 Pick. 328; *Cabot v. Haskins*, 3 Pick. (2d ed.) 95, note;

Grant v. Craigmiles, 1 Bibb, 206; *Lyon v. Annable*, 4 Conn. 350; *Eames v. Savage*, 14 Mass. 425; *Hunt v. Sanders*, 1 Marsh. 552; *Allen v. Booker*, 2 Stewart, 21; *Madera v. Smith*, 3 Stewart, 119; *Cook v. Daggett*, 2 Allen, 439. In case such agreement is made for the sale of land, the plaintiff, before he can recover, must show that he has tendered the whole purchase-money and demanded a deed. *Hudson v. Swift*, 20 John. 24. But if the seller convey the land to a third person, and thus by his own act deprives himself of the power of fulfilment of such parol contract, it excuses the purchaser from the necessity of making a tender of the remaining purchase-money, and demanding a deed. *Richards v. Allen*, 17 Maine, 296. The statute of limitations begins to run only from the time the seller is in fault under such parol contract. *Ib.* But assumpsit does not lie to recover back the money paid in such a case, if the agreement for conveyance was by a bond. *Goddard v. Mitchell*, 17 Maine, 366. Where a party, who is indebted to another, delivers goods and money in part payment, and the creditor afterwards refuses to account for them upon the debt, and requires and receives payment in full, without any deduction, the debtor may consider the agreement under which they were received as rescinded, and maintain assumpsit to recover the amount. *Fuller v. Little*, 7 N. H. 535; *Rowe v. Smith*, 16 Mass. 306. But see *Strong v. M'Connell*, 10 Vt. 232, 233.]

(*z*) See, in general, *ante*, 426, 427; [*Judson v. Wass*, 11 John. 437; *Tucker v. Wood*, 12 John. 190. In *Raymond v. Bearnard*, 12 John. 274, money advanced for

on a conditional contract of purchase, it may be recovered in this action if the condition be not performed. (*a*)

And where the plaintiff had instructed his brokers, the defendants, to buy for him fifty bales of cotton, and the defendants, having bought three hundred bales in their own names, on account of the plaintiff and several other principals, informed the plaintiff that they had bought fifty bales for him; and on the faith of this statement the plaintiff paid them part of the purchase-money; it was held that — the defendants not having bought the fifty bales according to their instructions — the plaintiff might recover from them the money so paid, as on a consideration which had failed. (*b*)

Where, however, there is a contract of purchase under seal, which provides for the recovery of the deposit, this action will not lie; but the party must sue on the covenant. (*c*)

Where some act is to be done by each party under a special contract, and the defendant, by his neglect, has prevented the plaintiff from carrying the contract into execution, he may recover back any money he has paid upon it, as money had and received to his use. (*d*) Thus where the plaintiff bought cord-wood of the defendant, to be paid for on a certain day, and it was incumbent on the defendant to cut off the boughs and trunks, and then cord it, and for the plaintiff to re-cord it; but the defendant neglected to cut and cord the whole of it in time; it was held that the plaintiff, not having received any part of the wood, might recover back the money he had paid. (*e*)

So, this action will sometimes lie where, although there has not been an entire failure of consideration, *some part* of the consideration has *wholly failed*. (*e*¹) Thus where the plaintiff ordered two parcels of terra-japonica, of certain specified weights, at a certain price; and the defendant sent invoices and bills of lading, which represented that two parcels of those weights respectively

goods was allowed to be recovered back, although the plaintiff did not call for the goods at the time agreed, and the defendant refused to deliver them on that ground.] Where a premium, paid in consideration of a lease being granted, may be recovered in this action, see *Wright v. Colls*, 8 C. B. 150. As to the case of an annuity purchased in ignorance of the death of the annuitant, see *Strickland v. Turner*, 7 Exch. 208.

(*a*) *Wright v. Newton*, 2 Cr., M. & R. 124.

(*b*) *Bostock v. Jardine*, 3 H. & C. 700.

(*c*) See *English v. Blundell*, 8 C. & P. 332.

(*d*) *Giles v. Edwards*, 7 T. R. 181; *Teed v. Blandford*, 2 Y. & J. 284.

(*e*) *Giles v. Edwards*, 7 T. R. 181.

(*e*¹) [See *Hill v. Rewee*, 11 Met. 722.]

had been shipped; and, on the faith thereof, the plaintiff accepted bills for the value of the whole quantities ordered, — which bills were duly paid; but, on the arrival of the goods, it was discovered that less than the specified quantities had been shipped; it was held that the plaintiff might recover, in this action, the sum overpaid to the defendant. (*f*)

But the count for money had and received is not maintainable if the contract has been in part performed, and the plaintiff has derived some benefit; so that were he to recover a verdict, the parties could not be placed in the same situation in which they respectively stood when the contract was entered into. (*g*) Thus, where the plaintiff apprenticed his son for six years, paying to the master a premium of 25*l.*; and the master duly taught the apprentice for a year, and then died; it was held that the plaintiff could not recover in this action, any part of the premium. (*h*) So, where A. agreed, in consideration of a premium, to let a house to B., which A. was to repair and grant a lease of within ten days, but B. was to have immediate possession; and B. paid the premium and took possession, and retained it after the ten days; but A.

This action will not lie where there has been only a partial failure of consideration.

(*f*) *Devaux v. Conolly*, 8 C. B. 640; and see *Covas v. Bingham*, 2 E. & B. 836.

(*g*) *Blackburn v. Smith*, 2 Exch. 783; *S. C.* 18 L. J. Exch. 187; *Hunt v. Silk*, 5 East, 449; *Teed v. Blandford*, 2 Y. & J. 278; [*Gilbert v. Ross*, 1 Strobh. 287; *Colville v. Besly*, 2 Denio, 139; *Minturn v. Main*, 3 Selden (N. Y.), 220; *Lyon v. Bertram*, 20 How. (U. S.) 154. A. purchased of B. a cargo of yellow and white corn on board B.'s schooner, the quantity not being known, and agreed to pay one sum per bushel for the yellow and another sum per bushel for the white; B. warranting it to be of a certain quality; A. paid B. \$1,200, "on account of corn per schooner." The schooner was hauled to A.'s wharf, and he took therefrom and put into his warehouse a part of the corn, and then refused to receive any more, because the residue was not such as B. had warranted it to be, and immediately gave notice to B. that he would receive no more of the cargo, and requested B. to take the schooner away; the corn thus

taken by A. amounted, at the agreed price per bushel, to \$1,067; and A. sued B. in an action for money had and received, to recover back the difference between that sum and \$1,200. It was held that the contract was entire, and that the action could not be maintained; that A. might have rescinded the contract by returning all the corn, and then have maintained an action to recover back the money advanced, or might have maintained an action on the warranty. *Clark v. Baker*, 5 Met. 452. See *Miner v. Bradley*, 22 Pick. 457. A different rule prevails where the price paid, or to be paid, is clearly apportioned to different parts of what is to be performed, — although the latter is in its nature single and entire, — and the cause of rescinding is applicable to one of those parts, that may be rescinded without rescinding the whole. *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Hill v. Rewee*, 11 Met. 272; *Miner v. Bradley*, 22 Pick. 457.]

(*h*) *Whinchup v. Hughes*, L. R. 6 Q. B. 78.

omitted to repair and grant the lease; it was held that B. could not, by quitting for A.'s default, recover back the premium on a count for money had and received; but was bound to declare specially for the breach of the agreement. (*i*) So, where a party sold a patent right, and the vendee paid the money and used the patent right, and enjoyed a benefit therefrom, but it afterwards appeared that the patent was invalid; it was held, that money had and received could not be maintained, a partial benefit having been received by the plaintiff. (*j*) Upon the same principle, where the master and part owner of a vessel agreed to purchase his partner's moiety; and, having paid the purchase-money and received the title deeds, which he deposited as a security with a third person, he had the entire possession of the vessel given up to him; but his partner afterwards refused to execute a bill of sale, or refund the money; it was held, that an action for money had and received was not maintainable. (*k*)

And so, where A. purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the annuity was enrolled; the court held, that A.'s executors could not, on that ground, insist that the contract was void, and recover back the consideration money paid for the annuity; for the contract was executed; the testator had enjoyed the full consideration for his advance; and the claim of the executors was against equity and good conscience. (*l*)

When a contract has been rescinded, either by the mutual consent of the parties, or by virtue of a clause contained therein, the common count for money had and received lies, to recover any money which may have been paid by the plaintiff thereunder. (*m*)

It lies where contract rescinded.

(*i*) *Hunt v. Silk*, 5 East, 449.

(*j*) *Taylor v. Hare*, 1 N. R. 260. [See *Bliss v. Negus*, 8 Mass. 46; *Earl v. Page*, 6 N. H. 467; *Dickinson v. Hall*, 14 Pick. 217; *Foss v. Richardson*, 15 Gray, 305, 306; *Nash v. Lull*, 102 Mass. 60; *Howe v. Richards*, 102 Mass. 64, note.]

(*k*) *Teed v. Blandford*, 2 Y. & J. 278. [If a man contracts for the purchase of a piece of land, and a deed of a different piece of land is sent to him, he need not receive it. But if he does receive it, and the deed takes effect by a complete delivery,

which of course indicates an acceptance, he cannot recover back the consideration paid by showing that both parties understood the deed to have a different operation and effect from that which really belonged to it. *Hoar J.* in *Foss v. Richardson*, 15 Gray, 306.]

(*l*) *Molton v. Camroux*, 2 Exch. 487, 495; *S. C.* in error, 4 Exch. 17; *Davis v. Bryan*, 6 B. & C. 651.

(*m*) *Payne v. Whale*, 7 East, 274; [*Moyer v. Shoemaker*, 5 Barb. 319; *Raymond v. Bearnard*, 12 John. 275; *Gillet*

So, if an *annuity* be set aside at the instance of the grantor, for non-compliance with the statute as to the memorial, &c., the grantee may in general maintain an action for money had and received, to recover back the purchase-money or price. (*n*) And even if the annuity has not been actually set aside, the grantee has this remedy, if the grantor has communicated to the grantee that the memorial is defective, and has, on that ground, treated for a compromise; although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones, nor takes any active measures to set aside the securities before he sues. (*o*) But it seems that if the grant of the annuity has not been set aside by the court, the consideration money is not recoverable, even although the memorial be defective; unless the grantee prove that the grantor has refused to continue the payment of the annuity; or, upon request so to do, has declined to execute valid securities. (*p*) And, in such a case, there must be clear proof of the election of the grantor, to avail himself of the defect in the memorial, and to treat the annuity as void. (*q*)

When it lies
by grantee of
annuity.

But in these cases the defendant, though liable to the action, is entitled to deduct from the purchase-money the payments made by him under the annuity deed. (*r*)

So where a policy of insurance is avoided, on the ground of the misrepresentation or concealment by the assured of a material fact, and the assured has not been guilty of fraud; he is entitled to recover in this action all premiums which he has paid under the policy. (*s*)

Or to recover
premiums
paid on policy
of insurance.

Where a scheme for establishing a *tontine* was put forth, stating

v. Maynard, 5 John. 85; *Feay v. De Camp*, 15 Serg. & R. 227; *Danforth v. Dewey*, 3 N. H. 79; *Davis v. Marsten*, 5 Mass. 199; *Bradford v. Manly*, 13 Mass. 139. See *Sims v. Hutchins*, 8 Sm. & M. 318; *White v. Wood*, 15 Ala. 358.]

(*n*) *Show v. Webb*, 1 T. R. 732; *Scurfield v. Gowland*, 6 East, 241; per *Holroyd J.* *Davis v. Bryan*, 6 B. & C. 651, 656. [If money is advanced on a contract, which is invalid by reason of an informality, it may be recovered back. *Boisgerard v. New York Banking Co.* 2 Sandf. Ch. 23.]

(*o*) *Waters v. Mansell*, 3 Taunt. 56.

(*p*) *Weddell v. Lynam*, 1 Esp. 309; *S. C. nom. Widdle v. Lynam*, Peake Add. Ca. 30. And it appears to be unnecessary in such a case to tender back the old deeds.

(*q*) *Cowper v. Godmond*, 9 Bing. 748; recognized in *Churchill v. Bertrand*, 3 Q. B. 568, 573.

(*r*) *Hicks v. Hicks*, 3 East, 12; *Widdle v. Lynam*, *supra*; *Hills v. Hills*, 4 Esp. 196; *Byne v. Vivian*, 5 Ves. jun. 608.

(*s*) Per *Parke B.* *Anderson v. Thornton*, 8 Exch. 425, 428.

that the money subscribed was to be laid out at interest; and —
 By allottees of shares, &c. after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest — the directors resolved to abandon the project; it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without any deduction of any part towards the payment of the expenses incurred. (*t*)

So, the allottee of shares in a projected railway company may, on the scheme being abandoned, recover from one who was an acting member of the managing committee, the deposits paid by him in respect of such shares. (*u*)

And the same rule applies to the case of a subscriber to an abortive company, the object of which was the working of a mine on the cost-book principle. (*x*)

But an allottee of shares in a projected railway company, who has executed the “parliamentary contract” and the “subscribers’ agreement,” cannot recover back his deposits, on the project being abandoned. (*y*) Nor can he do so if, although he has not executed these instruments, he has received scrip certificates stating, “that the ‘subscribers’ agreement’ and ‘parliamentary contract’ had been signed by the person to whom the certificate was issued;” (*z*) nor if all the money paid as deposits on the shares allotted, has been spent in accordance with the terms on which the allotments were made; (*a*) provided the terms in question were such as the directors had, by law, power to impose. (*b*)

Where, however, shares were allotted on the terms that, “in the event of the act not being obtained, the directors undertook to re-

(*t*) *Nockells v. Crosby*, 3 B. & C. 814 See *Lloyd v. Sandilands*, Gow, 13. [See *Carter v. Carter*, 14 Pick. 424; *Wharton v. Hudson*, 3 Rawle, 391; *Murray v. Richards*, 1 Wend. 58. The action for money had and received, lies where money has been delivered to one to be applied to a particular purpose, and he has neglected or refused so to apply it. *Strong v. Bliss*, 6 Met. 395, per Shaw C. J.; *Wales v. Wetmore*, 3 Day, 252.]

(*u*) *Moore v. Garwood*, 4 Exch. 681; 19 L. J. Exch. 15; *Walstab v. Spottis-*

woode, 15 M. & W. 501; *Chaplin v. Clarke*, 4 Exch. 403; *Watson v. Earl Charlemont*, 12 Q. B. 856, 870; *Ward v. Lord Londesborough*, 12 C. B. 252.

(*x*) *Johnson v. Goslett*, 18 C. B. 728; *S. C.* (in Cam. Scac.), 3 C. B. N. S. 569.

(*y*) *Garwood v. Ede*, 1 Exch. 264; *Watts v. Salter*, 10 C. B. 477.

(*z*) *Clements v. Todd*, 1 Exch. 268.

(*a*) *Jones v. Harrison*, 2 Exch. 52; *Wille v. Parratt*, 3 Exch. 211.

(*b*) *Ashpitel v. Sercombe*, 5 Exch. 147.

turn the whole of the deposits, without deduction ;” it was held that, on the scheme being abandoned, an allottee might recover his deposits, although he had executed the “parliamentary contract” and the “subscribers’ agreement.” (*c*)

And where an allottee of shares in a projected railway company, had been induced to execute the “parliamentary contract” and “subscribers’ agreement,” by fraudulent misrepresentations on the part of the promoters thereof; he was held to be entitled, on the project being abandoned, to recover the amount of his deposits, notwithstanding his having executed those instruments. (*d*)

So, if one man sell shares to another in a projected joint stock company, and the project is afterwards abandoned; the buyer of such shares may recover the purchase-money from the seller, in an action for money had and received, although the seller was not the original holder of such shares. (*e*)

And where money was paid for the purchase of shares in a joint stock company, and a transfer was executed by the seller, to which the directors of the company refused to give their assent, the money so paid was held to be recoverable from the seller, in this form of action. (*f*)

So, if conduct-money be paid to a witness at the time he is served with a subpoena; and, in consequence of the cause being settled, the trial does not take place, and the witness incurs no expense, and does no act under the subpoena; the money so paid to him may be recovered back, in an action for money had and received. (*g*)

Other cases.

So this action lies to recover back a sum of money paid for the future maintenance of a bastard child, if the child die before any expense is incurred; or a sum of money paid to parish officers, contrary to the statute, for supporting such child, where expenses equal to the amount have not been incurred. (*h*)

(*c*) *Mowatt v. Lord Londesborough* (in error), 4 E. & B. 1; S. C. in Q. B. 3 E. & B. 307.

(*d*) *Wontner v. Shairp*, 4 C. B. 404; and see *Watts v. Salter*, 10 C. B. 477, 513; *Jarrett v. Kennedy*, 6 C. B. 319.

(*e*) *Kempson v. Saunders*, 4 Bing. 5.

(*f*) *Wilkinson v. Lloyd*, 7 Q. B. 27. But this case has been held not to apply where shares are bought by a broker, for a purchaser, on the London Stock Exchange, there not being — according to the usage of

the stock exchange — any obligation on the seller of the shares, to obtain the consent of the directors to the transfer. *Stray v. Russell*, 1 E. & E. 888.

(*g*) *Martin v. Andrews*, 7 E. & B. 1.

(*h*) *Chappel v. Poles*, 2 M. & W. 867; *Clark v. Johnson*, 3 Bing. 424; *semble*, that the whole sum so paid might be recovered in this action, the contract being illegal and void. *Chappel v. Poles*, 2 M. & W. 867.

A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be discharged on paying 700*l.* only; B. threatened to complain to C.'s employers; to prevent which C. advanced 100*l.*; and B. agreed that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C. the balance was recovered; and it was held, that the representatives of C. might recover the 100*l.* from the representatives of B., on the count for money had and received. (*i*)

But the mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter, because of its non-compliance with the provisions of the statute of frauds, will not entitle the party who has paid such money, to recover the same as on a failure of consideration; for, in such a case, the contract is not void, but there is merely a deficiency in the evidence thereof. (*k*)

And a party who enters and runs in a race an unqualified horse, is not entitled to recover back the subscription paid by him, as upon a failure of consideration. (*l*)

9. The count for money had and received is also maintainable, for the recovery of money paid under a *mistake* on the part of the payer, of a *material fact*; (*m*) that is, of a

Cases in which money is not recoverable on this ground.

(*i*) *Platts v. Lean*, 3 C. & P. 561.

(*k*) *Sweet v. Lee*, 3 M. & G. 452; 4 Scott N. R. 77, 90; [*Leroux v. Brown*, 12 C. B. 801. Money paid on a contract invalid by the statute of frauds, can be recovered by the party who paid it, only on a refusal of a specific performance of his contract, by the party receiving the money; *Beaman v. Buck*, 9 Sm. & M. 207; *Cobb v. Hall*, 29 Vt. 510; *Collier v. Coates*, 17 Barb. 471; *Coughlin v. Knowles*, 7 Met. 57; *Abbott v. Draper*, 4 Denio, 51; or an inability on his part to perform it, or a mutual abandonment of the contract. *Sims v. Hutchins*, 8 Sm. & M. 328; *Battle v. Rochester City Bank*, 5 Barb. 414; *Thompson v. Gould*, 20 Pick. 134.]

(*l*) *Goldsmith v. Martin*, 4 M. & G. 5; 4 Scott N. R. 620; *Wellar v. Deakins*, 2 C. & P. 618.

(*m*) Per Lord Mansfield, *Bize v. Dick-*

son, 1 T. R. 285, 287; [*Potter v. Everett*, 2 Hall, 252; *Dickens v. Jones*, 6 Yerger, 483; *Burr v. Veeder*, 3 Wend. 412; *Franklin v. Raymond*, 3 Wend. 69; *Mowatt v. Wright*, 1 Wend. 355; *Sprague v. Birdsall*, 2 Cowen, 419; *Utica Bank v. Van Geison*, 18 John. 485; *Tinslar v. May*, 8 Wend. 561; *Pearson v. Lord*, 6 Mass. 81; *Garland v. Salem Bank*, 9 Mass. 408; *Bond v. Hayes*, 12 Mass. 36; *Lazell v. Miller*, 15 Mass. 208; *Norton v. Marden*, 15 Maine, 45; *Thomas v. Brady*, 10 Barr, 164; *Wilson v. Sergeant*, 12 Ala. 778; *Goddard v. Merchants' Bank*, 2 Sandf. (S. C.) 247; *West v. Houston*, 4 Harring. 170; *Bank of Commerce v. Union Bank*, 3 Comst. 230. Money paid by one party to another, through a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back. *City Bank v. Bank of Albany*, 1 Hill, 287.

fact which, in the absence of mistake, would have made the person paying liable to pay the money. (*n*)

Thus, where the plaintiff was surety in a bond given by A. to the defendants, the guardians of a union, conditioned for the accounting to them of moneys received by A. as treasurer of the union; and certain moneys were, by the authority of the defendants, paid into a bank in which A. was partner, to the account of the defendants; and, the bank having stopped payment, the plaintiff was called upon by the defendants to pay, and did pay, the moneys in question, as surety; it was held that the plaintiff, having paid the same in ignorance of the fact that these moneys had never been, either actually or constructively, received by A. alone, might recover against the defendants in this action. (*o*)

See *Wheaden v. Olds*, 20 Wend. 174; *Martin v. McCormick*, 4 Selden (N. Y.), 331. If a guardian sell the lands of his ward under a license of court, without taking the oath and giving the bonds as required by law, it seems that the purchaser, after having paid a part of the consideration, may refuse to take a deed, and may recover back the money paid by him. *Williams v. Reed*, 5 Pick. 480. Uncertainty of the parties about a fact, which is afterwards made certain, does not defeat a compromise of the suit, and give a right to recover back the money paid in pursuance of it, though, if the fact had been known at the time of the compromise, it would not have been made. *Mowatt v. Wright*, 1 Wend. 433. If a purchaser of goods gives a negotiable note for the price, and he afterwards discovers that the goods were overcharged, or that too large a sum is included in the note by mistake, he will immediately, before paying the note, have a right of action against the vendor to recover back the amount thus overpaid; and although the mistake might be corrected in an action on the note by the original promisee, yet if the promisor pay the whole, even after he has discovered the mistake, this will not defeat his right of action. *Whitcomb v. Williams*, 4 Pick. 228; *Gooding v. Morgan*, 37 Maine, 419. Where an administrator, supposing an estate solvent, pays a creditor of the estate

more than his distributive share, upon final settlement, the administrator may, in his individual character, recover back the excess in an action for money had and received. *Rogers v. Weaver*, 5 Ham. 536; *Walker v. Hill*, 17 Mass. 380. But if an executor, under a belief that the estate is solvent, request a person to procure a note given by the testator, which is accordingly procured by paying the full amount due upon it, and the estate afterward prove to be insolvent, the executor can maintain no action against the person thus procuring the note to recover back the difference between the sum paid for it, and the dividend decreed upon it. *Austin v. Henshaw*, 7 Pick. 46. See *Rose v. Shore*, 1 Call, 540; *Tybout v. Thompson*, 2 Browne, 27; *Eagle Bank v. Smith*, 5 Conn. 71; *Smith v. Seaton, Minor*, 77; *Ashe v. Livingston*, 2 Bay, 80. So, where A., under a false impression that he owes money to B., pays it by arrangement to C., a creditor of B., who receives it in good faith; A. cannot recover it back from C., who, in consequence of such payment, may have lost or waived his remedy against his debtor, B. *Guild v. Baldrige*, 2 Swan (Tenn.), 295, per McKinney J. *arguendo*.]

(*n*) Per Bramwell B. *Aiken v. Short*, 1 H. & N. 210, 215; [*Guild v. Baldrige*, 2 Swan (Tenn.), 295.]

(*o*) *Mills v. Guardians of Alderbury Union*, 3 Exch. 590.

So, in *Milnes v. Duncan*, (*p*) it appeared that a bill of exchange had been drawn in Ireland, upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in England; but there was nothing on the face of the bill to show that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to the indorser, who had transferred it to him. The latter refused to pay it, alleging that the holder had made it his own by his *laches*. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp. The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder; and it was held that, this money having been paid in ignorance of the fact, it might be recovered back in an action for money had and received.

And, in the above case, Bayley J. said, "If a party pay money under a mistake of the real facts, and no *laches* is imputable to him, in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money."

But the rule on this subject has ceased to be thus limited; it being now held, that the possession of the means of knowledge by the party who paid the money, can be regarded only as affording a strong observation to the jury, to induce them to believe that he had actual knowledge of the circumstances; but that there is no conclusive rule of law, that because a party has the means of knowledge he has the knowledge itself. (*q*)

And, accordingly, where it appears that money has been paid by the plaintiff to the defendant, under a *bonâ fide* forgetfulness of facts which disentitled the latter to receive it, such money may be recovered back in an action for money had and received. (*r*)

(*p*) 6 B. & C. 671.

(*q*) Per Tindal C. J. *Bell v. Gardiner*, 4 M. & G. 11, 24; and see *Townsend v. Crowdy*, 8 C. B. N. S. 477; [*McKinney J. in Guild v. Baldridge*, 2 Swan (Tenn.), 295; *Ashurst J. in Chatfield v. Paxton*, 2 East, 471, note; *Waite v. Leggett*, 8 Cowen, 195; *Boyer v. Pack*, 2 Denio, 107; *Rutherford v. McIvon*, 21 Ala. 750;

Wheadon v. Olds, 20 Wend. 174. But see *Norton v. Marden*, 15 Maine, 45; *Metcalf J. in Benson v. Monroe*, 7 Cush. 132; *West v. Houston*, 4 Harring. 170; *Peterborough v. Lancaster*, 14 N. H. 382; *Gooding v. Morgan*, 37 Maine, 419.]

(*r*) *Kelly v. Solari*, 9 M. & W. 54, 55; *Lucas v. Worswick*, 1 Moo. & Rob. 293.

And it appears that the same rules apply, where money is allowed in account under a mistake as to a material fact. (s)

Money allowed in account.

So a person who, without knowledge of the forgery, discounts a *forged* navy bill, bank note, bill of exchange, or promissory note, for another, may recover back the money, as paid by mistake; for, in such case, there is a failure of the consideration. (t) So, where the plaintiffs, who were bill-brokers, discounted for the defendant a bill of exchange, which the latter did not indorse; and the signatures of the drawer and acceptor, the latter of whom kept an account with the plaintiffs, were forged: it was held that the defendant was liable to refund the money, and that the fact of his having paid over the amount to the indorsee, for whom he was broker, did not exonerate him. (u) And if a banker by mistake take up and pay a dishonored bill, for the honor of a customer whose name is forged (such bill having been presented to him as bearing the genuine indorsement of the customer), and the banker discover and give notice of the forgery to the former holder, so as to enable him to give due notice of non-payment to the prior parties: it seems that the money so

Action by party who pays or discounts a forged bill, &c.

(s) Per Best C. J. *Bramston v. Robins*, 4 Bing. 11, 15; and see *Shaw v. Picton*, 4 B. & C. 715; *Skyring v. Greenwood*, Ib. 281; *Shaw v. Dartnell*, 6 B. & C. 56; *Gingell v. Purkins*, 4 Exch. 720. But see *Lee v. Merrett*, 8 Q. B. 820.

(t) *Jones v. Ryde*, 5 Taunt. 588; *Gurney v. Womersley*, 4 E. & B. 133; and see *Timmins v. Gibbins*, 18 Q. B. 722; *Woodland v. Fear*, 7 E. & B. 519; [*Merriam v. Wolcott*, 3 Allen, 258, and cases cited; *Cabot Bank v. Morton*, 4 Gray, 156, 158; *Baxter v. Duren*, 29 Maine, 434. Where payment of a note is made in counterfeit bank bills, the person making payment being innocent, the payee may recover of him the amount of such bills in an action for money had and received. *Young v. Adams*, 6 Mass. 182; *S. P. Mudd v. Reeves*, 2 Har. & J. 368; *Hargrave v. Dusenbury*, 2 Hawks, 326; *Markle v. Hatfield*, 2 John. 455; *Keene v. Thompson*, 4 Gill & J. 463. But the one who has received such counterfeit bills or notes in payment of his debt, must return or

offer to return them in a reasonable time, or he will forfeit his right to recover the amount of them from the payer. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Raymond v. Baar*, 13 Serg. & R. 318; *Pindall v. North W. Bank*, 7 Leigh, 617; *Sims v. Clark*, 11 Ill. 137. A person who has been paid a demand in depreciated bank notes, may obtain redress in this form of action. *Bank of Missouri v. Benoist*, 10 Missou. 519. So, where a note with a forged indorsement, was sold by the defendant to the plaintiff, neither party knowing that the indorsement was forged, and the plaintiff, on discovering the fact of the forgery, offered to return the note to the defendant, and demanded the money paid for it, which the defendant refused to repay; it was held, that the plaintiff was entitled to recover the same in an action for money had and received. *Terry v. Bissell*, 26 Conn. 23.]

(u) *Fuller v. Smith*, R. & M. 49.

paid is recoverable by the banker, from the party to whom he paid it. (*x*)

But bankers who pay to a *bonâ fide* holder, a forged acceptance of a customer, made payable at their house, and who do not discover and give notice of the forgery until it is too late for the holder to give notice of non-payment, cannot recover back the amount from him. (*y*) And where a bill purporting to have been accepted by A., was presented for payment to his bankers on the day when it became due, and the latter, believing it to be the genuine acceptance of A., paid the amount; but on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money; it was held, that the holder of the bill was entitled to know on the day when it became due, whether it was honored or dishonored; and that, no notice of the forgery having been given on the day the bill became due, the parties who had paid the money were not entitled to recover. (*z*)

But if the drawee of a bill accept it, under a mistaken notion that it is drawn by his creditor; he cannot — on its appearing that the drawer's name was a forgery — recover the amount from a *bonâ fide* holder to whom he has paid it; because it was incumbent on him to be satisfied that the bill was in the drawee's hand, before he accepted or paid it. (*a*)

In general, a banker who pays a forged check which purports to be the check of a customer, must bear the loss; (*b*) and we have seen that, if a banker pay a check which has been improperly *altered* by a third person as to the amount, he has no claim against the customer who drew it, except for the original sum, unless the forgery was caused or facilitated by some negligence on the part of the customer. (*c*) But where the defendant, knowing

(*x*) *Wilkinson v. Johnston*, 3 B. & C. 428.

(*y*) *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnston*, 3 B. & C. 428, 435, 437.

(*z*) *Cocks v. Masterman*, 9 B. & C. 905.

(*a*) *Price v. Neal*, 3 Burr. 1354, 1357; S. C. 1 Bl. 390; *Barber v. Gingell*, 3 Esp. 60; per Abbott C. J. *Wilkinson v. Johnston*, 3 B. & C. 428, 434.

(*b*) *Hall v. Fuller*, 5 B. & C. 750; *Young v. Grote*, 4 Bing. 253. [See *Levy v. Bank of the United States*, 4 Dall. 234;

S. C. 1 Binn. 27. When a payment is made *bonâ fide* to a bank in notes purporting to be its own, and they are received as cash, but afterwards are discovered to be forged, the bank cannot maintain an action against the payer for the amount. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.]

(*c*) *Hall v. Fuller*, 5 B. & C. 740; *Maltby v. Carstairs*, 7 B. & C. 735; *Young v. Grote*, 4 Bing. 253.

a check to be post-dated, and that the drawers were insolvent, presented it for payment to the plaintiffs, who were bankers, and who, without knowledge of the facts, paid the amount, although they had no funds of the drawers in their hands at the time, but only expected some in the course of the day; it was held, that they were entitled to recover from the defendant the amount so paid, as money had and received to their use. (*d*)

And so, if a sheriff sell goods under a *fiери facias*, and pay over the proceeds to the execution creditor, in ignorance of an act of bankruptcy committed by the defendant in the action; and the sheriff is afterwards compelled to pay the amount to the assignees; he may recover it from the execution creditor as money paid in ignorance of facts; (*e*) even although the latter, after repaying the money, cannot be placed *in statu quo*. (*f*)

By sheriffs.

It is said, however, that to entitle a party to recover money in this form of action, on the ground that it was paid to the defendant by mistake, notice of the mistake must have been given to the defendant, and a demand made of the money. (*g*)

Action will not lie, without previous notice and demand.

So, if a party voluntarily pay money, which the law would not have compelled him to pay, but which in justice he ought to have paid, — such as a debt barred by the statute of limitations, bankruptcy, infancy, or the like, — he has no remedy to recover it back, (*h*) even although the demand arose out of an illegal transaction. (*i*)

Voluntary payments.

So, if a party, with full knowledge of the facts, voluntarily pay a demand unjustly made on him, and threatened or attempted to be enforced by *bonâ fide* legal proceedings, (*k*) he cannot recover

(*d*) *Martin v. Morgan*, 3 Moore, 635; *S. C. Gow*, 123. répétition n'est pas admise, à l'égard des obligations naturelles qui ont été volontairement acquittées." Code Civil, book

(*e*) *Brydges v. Walford*, 6 M. & S. 42; and see *Notley v. Buck*, 8 B. & C. 160; *Crowder v. Long*, *Ib.* 598. 3, tit. 3, art. 1235.

(*f*) *Standish v. Ross*, 3 Exch. 527, 534.

(*g*) Per *Martin and Bramwell BB.* *Free-man v. Jeffries*, L. R. 4 Exch. 189, 199, 200. (*i*) *Dawson v. Remnant*, 6 Esp. 25, 26, note; *Brisbane v. Dacres*, 5 Taunt. 143; [*Boutelle v. Melendy*, 19 N. H. 196.]

(*h*) *Bize v. Dickason*, 1 T. R. 286; *Farmer v. Arundel*, 2 Bl. 825; 2 Burr. 1012; *Bul. N. P.* 132; *Munt v. Stokes*, 4 T. R. 561; [*Boutelle v. Melendy*, 19 N. H. 196; *Hubbard v. Hickman*, 4 Bush. (Ky.), 204.] So by the French law: "La Duke de Cadaval *v. Collins*, 4 A. & E. 856, 866, 867. [See *Benson v. Monroe*, 7 Cush. 125. *Ignorantia legis non excusat*, is the maxim on which, in the opinion of some learned judges, seems to be founded the rule, that a man who pays money upon an illegal or unjust demand, with a full

the amount as money paid by compulsion, although, at the time, he protested against his responsibility. (*l*) Where, therefore, the plaintiff was about to compound with his creditors, and the defendant, who was a creditor, refused to sign the composition deed unless he was paid in full; whereupon the plaintiff gave a bill to the defendant's agent, for the difference between the amount of the composition and the full amount of the debt, and subsequently paid the same; it was held, that the plaintiff could not recover the amount so paid, inasmuch as the payment was voluntary, and made with full knowledge of the facts; and that it made no difference that the sum in question had not been recovered by action. (*m*)

Money paid
under a mis-
take as to
the law.

And if a person pay money under a mistake as to the law, or as to the *legal effect* of the circumstances under which it is paid, he cannot recover it back. (*n*) Thus,

knowledge of the facts, shall not be allowed to recover it back. Every man is presumed to know the law. Lord Ellenborough, in *Bilbie v. Lumley*, 2 East, 469; *Buller J.* in *Lowry v. Bordieu*, Dougl. 467; *Broom's Legal Maxims*, 122; *Morton J.* in *Haven v. Foster*, 9 Pick. 129.]

(*l*) *Brown v. M'Kinally*, 1 Esp. 279; *Knibbs v. Hall*, 1b. 84; *Jeudwine v. Slade*, 2 Ib. 572; *Cartwright v. Rowley*, 1b. 723; *Lothian v. Henderson*, 3 B. & P. 520; *Brisbane v. Dacres*, 5 Taunt. 147; *Graham v. Tate*, 1 M. & S. 610; *Skyring v. Greenwood*, 4 B. & C. 290; per *Holroyd J.* *Milner v. Duncan*, 1b. 679; [*Fellows v. School District in Fayette*, 39 Maine, 559; *Smith v. Readfield*, 27 Maine, 145; *Cunningham v. Boston*, 15 Gray, 468; *Benson v. Monroe*, 7 Cush. 125; *Gooding v. Morgan*, 37 Maine, 419, 422; *Boston v. Preston*, 12 Pick. 13; *Lee v. Templeton*, 13 Gray, 476; *Barrett v. Cambridge*, 10 Allen, 48; *Wilde v. Baker*, 14 Allen, 349; *Forbes v. Appleton*, 5 Cush. 115; *Cook v. Boston*, 9 Allen, 393.]

(*m*) *Wilson v. Ray*, 10 A. & E. 82; and see *Viner v. Hawkins*, 9 Exch. 266; *Gibson v. Bruce*, 5 M. & G. 399, 404. [Mr. Leake states the proposition, with qualifications, thus: "If a mere claim is made upon a person without any legal proceeding, and he pay it with full knowledge of all the circumstances of the claim and

without any compulsion or necessity, although the claim was unfounded, and he might have successfully resisted it, such payment is held to be voluntary, and cannot be recovered back." *Contr. (Eng. ed.)* 56.]

(*n*) *Stevens v. Lynch*, 12 East, 39; per *Holroyd J.* *East India Company v. Tritton*, 3 B. & C. 280, 290; *Platt v. Bromage*, 24 L. J. Exch. 63; [*Norton v. Marden*, 15 Maine, 45; *Elliott v. Swartwout*, 10 Peters, 137; *Hill v. Green*, 4 Pick. 114; *Lee v. Stuart*, 2 Leigh, 76; *Hosmer C. J.* 2 Conn. 673; *Wyman v. Farnsworth*, 3 Barb. 369; *Abell v. Douglass*, 4 Denio, 305; *Fleetwood v. City of New York*, 2 Sandf. (S. C.) 475; *Colwell v. Peden*, 3 Watts, 327; *Hubbard v. Martin*, 8 Yerger, 498; *Bean v. Jones*, 8 N. H. 149; *Silliman v. Wing*, 7 Hill, 159; *Onondaga v. Briggs*, 2 Denio, 26; *Ege v. Koontz*, 3 Barr, 109; *Robinson v. Charleston*, 2 Rich. 317; *Gooding v. Morgan*, 37 Maine, 419; *Downs v. Donnelly*, 5 Ind. (Porter) 496; *Dickens v. Jones*, 6 Yerger, 483; *Clarke v. Dutcher*, 9 Cowen, 674; *Mowatt v. Wright*, 1 Wend. 355. If a person voluntarily pays money in order to obtain the performance of an agreement for which he has no legal remedy, he cannot recover it back. *Hall v. Shultz*, 4 John. 240. See *Vest v. Wier*, 4 Blackf. 135. If the mistake be of the law of another country, or of another of

in *Bilbie v. Lumley*, (o) — which was an action by an underwriter, upon a policy on ship, to recover back money he had paid to the defendant, as for a loss by capture; it appeared that a material fact had been concealed from the underwriter, and that such concealment would have afforded him a defence; but that *after* he had been apprised of the concealment, he paid the money, — not being, at the time, aware of the legal effect thereof; and it was held, that he could not recover back the amount.

And the case of *Brisbane v. Dacres* (p) is to the same effect. There the captain of a king's ship brought home in her public treasure, upon the public service, and treasure belonging to private persons, for his own emolument; he received freight for both, and paid over one third of it, according to a usage theretofore established in the navy, to the admiral under whose command he sailed. He afterwards discovered, however, that the law did not compel captains to pay to admirals one third of such freight; and he thereupon brought an action for money had and received, to recover it back from the admiral's executrix; and it was held by the court, — *Chambre J.* dissenting, — that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law. (p¹)

the United States, the money paid may be recovered back. *Haven v. Foster*, 9 Pick. 112. For ignorance of the law of a foreign government is ignorance of *fact*; and, in this respect, the laws of the other states of the Union are foreign laws. *Haven v. Foster*, *supra*; *Norton v. Marden*, 15 Maine, 45. Where merchandise was purchased at a certain price per pound, deducting the duties, and the duties were by mistake calculated higher than the legal rate, it was held that the rule that money paid under mistake in ignorance of the law could not be recovered back, did not apply to the case, and that the seller could recover the difference. *Renard v. Fiedler*, 3 Duer (N. Y.), 318.] Sir W. D. Evans, in his edition of Pothier (vol. 2, 369-407), denies the soundness of this distinction (which is clearly established in the English law), and contends that money paid under a mere mistake of *law* without

any moral duty to pay it, ought to be recoverable back. Some of the writers on civil law, and M. Duesseau, a celebrated French lawyer, support this opinion. [See, also, *Northrop v. Graves*, 19 Conn. 548; *Culbreath v. Culbreath*, 7 Geo. 74; *Bize v. Dickason*, 1 T. R. 285; *United States v. Bartlett*, Davies, 9; 23 Amer. Jur. 146, 371; *Morton J. in Haven v. Foster*, 9 Pick. 129, and in *Claffin v. Godfrey*, 21 Pick. 14.] Pothier admits the distinction. By the French law (Code Civil, liv. 3, tit. 4, art. 1376, 1377), "celui qui reçoit par erreur ou sciemment, ce que ne lui est pas dû, s'oblige à le restituer à celui qui l'a indûment reçu. Lorsqu'une personne qui, par erreur, se croyait débitrice, a requitté une dette, elle a le droit de répétition contre le créancier."

(o) 2 East, 469.

(p) 5 Taunt. 143.

(p¹) [This case was rested by Mansfield,

And so if a tenant voluntarily pay the land tax, and for a long period afterwards pay his rent in full, without claiming any deduction on account of the payments he has made, as he might have done, he cannot afterwards recover from his landlord the moneys so paid. (*q*)

10. There are also cases in which money obtained by *fraud* is recoverable in an action for money had and received, (*r*) although

C. J. very much upon the ground, that, under all the circumstances it was not against conscience for the executrix to retain the money. Mansfield C. J. in *Brisbane v. Dacres*, *supra*. This is noticed as an important consideration in this case by Broom Legal Max. 122, 123, and by Smith, in note to *Marriott v. Hampton*, 2 Smith Lead. Cas. 242, 244. So in *Fellows v. School District in Fayette*, 39 Maine, 559. It was also thrown out in *Brisbane v. Dacres*, that if it were *contra æquum et bonum*, that the defendant should retain money paid to him, it might be recovered back, though paid with a full knowledge of all the facts. The case of *Dew v. Parsons*, 2 B. & Ald. 563, seems to rest upon the same reason; so *Watkins v. Otis*, 2 Pick. 88. So does the case of *Northrop v. Graves*, 19 Conn. 548, in which it was held, that if money is paid by one, under mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, whether such mistake be one of fact or of law. In this case, A., the executor of B., supposing C., the wife of D., to be entitled under the will of B. to a legacy of \$500, paid that sum out of B.'s estate to C. in the presence of D. and with his consent, whereas C. was not in truth entitled to such a legacy by the will of B., which was known by D. at the time of payment, but was not discovered to A. In an action for money had and received, afterwards brought by A. against D., it was held, that the money was in effect received by D., that he had no moral or conscientious right to retain it, and that A. was entitled to recover it back in this

action. The authorities were thoroughly examined in an elaborate opinion given by Church C. J. and he considered the above result in accordance with the principles of the common law and Christian morals. A similar decision on a similar state of facts was made in *Culbreath v. Culbreath*, 7 Geo. 74. See *Sheldon v. School Dist. in Suffield*, 24 Conn. 88. In *Brisbane v. Dacres*, *Chambre J.* said: "Suppose an administrator pays money *per capita* in misapplication of the effects of the intestate, shall it be said that he cannot recover it back?" In *Johnson v. Johnson*, 3 Bos. & Pul. 162, 169, Lord Alvanley C. J. held that an executor could not sustain an action for money had and received to obtain repayment of a legacy paid to a legatee under a mistake in reference to the assets. See *Bize v. Dickason*, 1 T. R. 285; *Chatfield v. Paxton*, cited 2 East, 471, note (*a*); *Tiffany v. Johnson*, 27 Miss. (5 Cush.) 227; *United States v. Bartlett, Davies*, 9; *Holbrook v. Allen*, 4 Florida, 87. In *Benson v. Monroe*, 7 Cush. 125, it was clearly *contra æquum et bonum* for the defendant to retain the money, but that case turned upon an application of the general rule, that money paid in settlement of a suit cannot be recovered back.]

(*q*) *Denby v. Moore*, 1 B. & Ald. 123; *Spragg v. Hammond*, 2 B. & B. 59.

(*r*) See *Billing v. Ries*, Car. & M. 26. [See *Manuf. & Mech. Bk. v. Gore*, 15 Mass. 75; *Dana v. Kimball*, 17 Pick. 545; *Wells v. Waterhouse*, 22 Maine, 131; *Gloucester Bank v. Salem Bank*, 17 Mass. 33. And where a note is given by the party fraudulently procuring the money, the party defrauded may recover in this action before the note falls due. *Gibson*

the fraud was committed, not by the defendant personally, but by his partner, (s) or agent. (t) Thus, if the defendant has obtained payment of money from a third person by means of a false or forged representation of authority from the plaintiff; the latter may adopt the agency and sue the defendant in this action, provided he be not shown to have actually committed a felony. (u) So if a party obtains money from an agent by fraud, either the principal or the agent may recover it from him in this action. (x) And where the defendant induced the plaintiff's agent to hand over a sum of money to him, under pretence that he wished the agent to lend him the sum in question, but, in reality, in order that he, the defendant, might appropriate it in paying a debt due to him from the plaintiff; and he did so appropriate it; it was held that the principal might recover this sum, in an action for money had and received. (y)

Money obtained by fraud,

So, if money be obtained by fraud from a party who has a present right to hold it, this action will lie, even although the defendant be really entitled to the money; provided his right thereto depend upon a question not of common law jurisdiction. (z)

So, where money has been paid as a consideration for doing some act for the use of the plaintiff, and it appears that the defendant has undertaken what he could not perform, and has thus imposed on the plaintiff; the latter may at once sue the defendant for such money, although it was agreed that it should be repaid at a future time, in case of the defendant failing to do what he had undertaken. (a)

v. Stevens, 3 McLean, 551; *Manuf. & Mech. Bank v. Gore*, *supra*. If a creditor procure an attachment upon the real estate of his debtor to be antedated, so that it falsely appears of record that the attachment was prior to a conveyance made by the owner to a third person, and such third person, being the grantee of the real estate, not knowing that the attachment was antedated, but being deceived by the record of it, causes the amount of the debt, purporting to be secured by the attachment, to be paid, he may recover back such amount of the creditor in an action at law, although it was paid to the creditor by the hand of his debtor, without disclosing that he paid it as agent of the plaintiff. *Handly v. Call*, 30 Maine, 9. It is no defence that in receiving the money from the debtor,

the creditor intended no fraud upon the plaintiff, being the grantee of the land, or that the creditor was ignorant that the grantee of the land had furnished the money; or, that the money was paid before there was any certainty that the grantee would be injured by the attachment. *Ib.*

(s) See *Marsh v. Keating*, 1 Bing. N. C. 198; 1 Scott, 5.

(t) Per Lord Ellenborough, *Crockford v. Winter*, 1 Camp. 124, 127.

(u) Per Cur. *Vaughan v. Matthews*, 13 Q. B. 187, 189.

(x) *Holt v. Ely*, 1 E. & B. 795.

(y) *Litt v. Martindale*, 18 C. B. 314.

(z) *Crockford v. Winter*, 1 Camp. 124; *Hasser v. Wallis*, 1 Salk. 28; and see *Martin v. Morgan*, 3 Moore, 635.

(a) *Hogan v. Shee*, 2 Esp. 522. [If one

So, where the defendant had fraudulently colluded with J. S., who was in insolvent circumstances, to obtain goods from the plaintiff, and the proceeds of such goods eventually came to the defendant's hands, in satisfaction of a debt due to him from J. S.; it was held, that the plaintiff was entitled to recover such proceeds in an action for money had and received. (*b*) And so, if A. fraudulently procure a bill of exchange from B., and afterwards become bankrupt, and his assignees receive the money for the bill, B. may recover it from them in this action. (*c*)

So if an attorney, without any authority, bring an action against B., in the name of A., a nominal or imaginary plaintiff, and B. pay the costs of the writ to the attorney, he, B., may sue the attorney as for money had and received, to recover back the amount. (*d*)

And the case of moneys received by a creditor from his debtor, in contemplation of bankruptcy, and by way of fraudulent preference, and which are reclaimable by the trustee or assignees of the debtor's estate, may also be mentioned as falling within this division. (*e*)

So, where a sale by auction is advertised, or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him renders the sale void, and entitles the purchaser to recover his deposit from the auctioneer in an action for money had and received. (*f*)

But if a party be induced to purchase an article by the fraudulent misrepresentations of the seller respecting it; and, after discovering the fraud, he continues to deal with the article as his own, he cannot recover from the seller the price paid to him for it. (*g*) So, if the purchaser cannot place the seller *in statu quo* — *e. g.* where he is unable to return the article in the same plight in which

man take another's money to do a thing, and refuses to do it, it is a fraud, and it is at the election of the party injured, either to affirm the agreement by bringing an action for the non-payment of the money, or to disaffirm the agreement *ab initio* by reason of the fraud, and bring an action for money had and received to his use. *Murphy v. Barron*, 1 H. & Gill, 258; *Wales v. Wetmore*, 3 Day, 252. See *Morton v. Chandler*, 8 Greenl. 9; *Bliss v. Thompson*, 4 Mass. 488.]

(*b*) *Abbotts v. Barry*, 5 Moore, 98; *Hill v. Perrott*, 3 Taunt. 274.

(*c*) *Harrison v. Walker*, Peake, 111.

(*d*) *Dupen v. Keeling*, 4 C. & P. 102. See further as to the remedies against an attorney who acts without authority. *Bayley v. Buckland*, 1 Exch. 1.

(*e*) See *Eden* (2d ed.) 25; *Gibbins v. Phillips*, 7 B. & C. 529.

(*f*) *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B. N. S. 204; and see *ante*, 406, 407.

(*g*) *Campbell v. Fleming*, 1 A. & E. 40; [*Treat v. Orono*, 26 Maine, 217.]

he received it, — he cannot recover what he paid for it, in this action. (*h*) So, if a party, *after* he has discovered a fraud practised on him, and which induced him to enter into a contract, voluntarily pay a sum of money under it, with knowledge of the facts, he cannot claim a return of the money so paid. (*i*) And it would seem that, in such a case, the right to repudiate the contract would not be revived, by the subsequent discovery of another incident in the same fraud. (*k*)

11. So, money obtained by *oppression*, and by taking advantage of the distresses of others, in violation of laws made for their protection, may be recovered in an action for money had and received. (*l*)

or by oppression or extortion.

Thus, it was held that this action lay to recover back the *excess* of interest taken from the plaintiff on a usurious loan to him; (*m*) or money paid by A. to B., in order to compromise a *qui tam* action for usury brought by B. against A., on the ground of a usurious transaction between the latter and one E.; (*n*) or money paid to a lottery-office keeper for insuring tickets, contrary to the statute 19 Geo. 3, c. 21. (*o*) So, it has been held that this action will lie to recover money paid by the plaintiff, a bankrupt, as an inducement to the defendant, his creditor, to sign his certificate. (*p*) And, in

(*h*) *Clarke v. Dickson*, E., B. & E. 148.

(*i*) *Miles v. Dell*, 3 Stark. 25, 26.

(*k*) *Campbell v. Fleming*, 1 Ad. & E. 40.

(*l*) Per Lord Mansfield, *Lowry v. Bourdieu*, 2 Dougl. 472; *Jones v. Barkley*, Ib. 697, note. [See *Worcester v. Eaton*, 11 Mass. 376; *Goddard v. Bulow*, 1 Nott & McCord, 45; *Atwater v. Woodbridge*, 6 Conn. 223; *Adam v. Litchfield*, 10 Conn. 127.]

(*m*) *Smith v. Bromley*, 2 Dougl. 697. notes (*a*), (*b*); *Astley v. Reynolds*, Str. 915; *Williams v. Hedley*, 8 East, 383; Rep. temp. Talbot, 40, note; Lofft, 345; *Browning v. Morris*, Cowp. 792; [Boardman v. Roe, 13 Mass. 105; *Bond v. Hays*, 12 Mass. 135; *Worcester v. Eaton*, 11 Mass. 376; *Wheaton v. Hibbard*, 20 John. 290; *Bearce v. Barstow*, 9 Mass. 48; *Willie v. Green*, 2 N. H. 333; *Bond v. Jones*, 8 Sm. & M. 368; *Grow v. Albee*, 19 Vt. 540; *State Bank v. Ensminger*, 7 Blackf. 105. But since the Revised Statutes of Massachusetts have declared the usurious con-

tract not to be void, it has been held in that state, that excess of interest paid cannot be recovered back in an action for money had and received. The remedy furnished by the statute must be pursued. Rev. Stat. c. 35, §§ 2, 3; *Crosby v. Bennett*, 7 Met. 17. In Maine, the statute of 1834, c. 122; § 4, has not prescribed the form of action to recover back usurious interest; and it may, therefore, be recovered in an action for money had and received. *Webb v. Wilshire*, 19 Maine, 406; *Pierce v. Conant*, 25 Maine, 33.]

(*n*) *Williams v. Hedley*, 8 East, 378.

(*o*) *Jacques v. Withy*, 1 H. Bl. 65; 2 Bl. 1073; *Clark v. Shee*, Cowp. 197; *Browning v. Morris*, Ib. 790; *Clayton v. Dilly*, 4 Taunt. 165; *Thistlewood v. Crockcroft*, 1 M. & S. 502; *Drummond v. Day*, 1 Esp. 152.

(*p*) *Lowry v. Bourdieu*, 2 Dougl. 472; *Smith v. Bromley*, Ib. 697, n. (3); Bul. N. P. 133; *Clark v. Shee*, Cowp. 200; *Browning v. Morris*, Ib. 792.

like manner, money privately paid to an outstanding creditor, to induce him to concur with other creditors in a composition agreement made by an embarrassed debtor, may in some cases be recovered in this action. (*q*) Thus, if bills are given to the creditor, either for the amount of the composition, or for the money paid to induce him to execute the composition deed, and such bills are negotiated by the creditor, and payment thereof is enforced by the holders against the debtor; it seems that — inasmuch as the fact of the bills being negotiated, deprives the debtor of the defence which he would have had to an action on the bills by the creditor — he may, after paying the same, recover the excess from the creditor, as money paid by compulsion. (*r*)

And where a debtor, before the creditors enter into the composition, pays money down to one creditor as the price of procuring a fraud on his other creditors, he can recover the money so paid in this action. (*s*)

So, a fee paid by a publican in order to get his license, but which fee was not legally claimable, may be recovered in this action, as having been paid by compulsion. (*t*) So fees charged by a parish clerk, — contrary to the 6 & 7 Will. 4, c. 86, s. 35, — for extracts taken from a register book of burials and baptisms, have been held to be recoverable from him in this action. (*u*) So, where the steward of a copyhold court refused to admit the plaintiff, except upon payment of certain fines and fees not duly payable; and the plaintiff paid the fines and fees in question under protest; it was held that he could recover them in this action. (*x*) And so, an action for money had and received is maintainable against a lessee of turnpike tolls, who exacts from the plaintiff more toll than ought to be taken; (*y*) or against a broker who demands excessive charges on

(*q*) *Smith v. Cuff*, 6 M. & S. 160; *Alsager v. Spalding*, 6 Scott, 204.

(*r*) *Horton v. Riley*, 11 M. & W. 492; *Bradshaw v. Bradshaw*, 9 M. & W. 29.

(*s*) *Atkinson v. Denby*, 6 H. & N. 778; *S. C.* (in *Cam. Scac.*), 7 H. & N. 934. This was formerly doubted. See per *Cur.* *Higgins v. Pitt*, 4 Exch. 312, 325.

(*t*) *Morgan v. Palmer*, 2 B. & C. 729. [See *Mays v. Cincinnati*, 1 Ohio St. 268.]

(*u*) *Steele v. Williams*, 8 Exch. 625.

(*x*) *Traherne v. Gardner*, 5 E. & B. 913. *Seemle*, money had and received lies, to

recover back an extortionate charge made by the steward of a manor, for attending at a trial with court rolls which the plaintiff was bound to produce; — *v. Piggot*, cited by Lord Kenyon, in *Cartwright v. Rowley*, 2 Esp. 723.

(*y*) 1 Wightv. 22; *Lewis v. Hammond*, 2 B. & Ald. 206; *Waterhouse v. Keen*, 4 B. & C. 200. [But where one voluntarily pays a toll, which the law would not compel him to pay, he cannot recover it back. *Sprague v. Birdsall*, 2 Cowen, 419.]

a distress for rent, and which are paid by the tenant in order to prevent a sale, — even although the tenant may have applied for and obtained time. (z)

It is likewise an undoubted proposition, that if goods be wrongfully taken or detained, and a sum of money be paid, merely for the purpose of obtaining possession thereof, especially if it be paid under protest, such money can be recovered back, not on the ground of *duress*, but simply because the payment thereof was not voluntary. (a) Thus, in *Astley v. Reynolds*, (b) where the plaintiff had pawned plate with the defendant, and the latter would not part with it unless the plaintiff paid him illegal interest; it was held that the excess paid to redeem the goods, might be recovered back upon the count for money had and received, although the plaintiff might have had trover for his goods, on tendering the sum legally due to the plaintiff.

So if a party pay to an arbitrator, in order to be permitted to take up an award, a sum of money larger than is reasonably due to such arbitrator in respect of fees, &c.; he may, it appears, sue for the excess in this action. (c)

So, where a carrier refused to deliver goods to the plaintiff without being paid an excessive price for the carriage; it was held that this action would lie to recover back the amount of overcharge, although there had been no tender of any smaller sum. (d) And the same principle was acted on in the case of *Parker v. The Great Western Railway Company*, (e) in which it appeared that the defendants had insisted upon being paid a larger sum for the carriage of the plaintiff's goods, than they were authorized to take under their act of parliament. So where money was paid, under protest, by a mortgagor in order to obtain possession of his title-deeds, which were withheld by the attorney of the mortgagee on an un-

(z) *Hills v. Street*, 5 Bing. 57.

(a) Per Parke B. *Atlee v. Backhouse*, 3 M. & W. 633, 650; [*Chase v. Dwinal*, 7 Greenl. 134;] and see *Oates v. Hudson*, 6 Exch. 346; *Shaw v. Woodcock*, 7 B. & C. 73.

(b) 2 Str. 915. [See *Preston v. Boston*, 12 Pick. 14.]

(c) *Re Coombes*, 4 Exch. 839, 841, 843; *Fernley v. Branson*, 20 L. J. Q. B. 178.

(d) *Ashmole v. Wainwright*, 2 Q. B.

846; [*Piddington v. South Eastern Railway Co.* 5 C. B. N. S. 111; *Baxendale v. Eastern Counties Railway Co.* 4 C. B. N. S. 63; *Baxendale v. Great Western Railway Co.* 32 L. J. C. P. 225; 33 Ib. 197.]

(e) 7 M. & G. 253; and see *Great Western Railway Company v. Sutton*, L. R. 4 Ap. Ca. 226 (overruling on this point *Garton v. Bristol & Exeter Railway Company*, 1 B. & S. 112); *Parker v. Bristol & Exeter Railway Company*, 6 Exch.

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founded claim of lien ; it was held that it might be recovered back as money had and received. (*f*) And so, where the attorney of a mortgagee, who had a power of sale, refused to stop the sale, or deliver up the title-deeds of the mortgaged property, except on payment by the mortgagor of certain expenses with which he was not properly chargeable ; it was held that the administratrix of the mortgagor, who had paid the excess under protest, could recover it in this action, although the right of the plaintiff to stop the sale was an equitable right only. (*g*)

So, if goods are seized under an excessive levy, and the owner thereof pay money to the sheriff to redeem them, he may recover it from the latter in this action. (*h*) And where the sheriff had seized certain goods, which were claimed by the assignees of a bankrupt as belonging to, and which did in fact belong to the bankrupt's estate ; and, in order to prevent the sheriff from proceeding to a sale, which he threatened to do, the assignees paid the sum claimed under the writ ; it was held that they were entitled to recover such sum, as money which had been paid by compulsion. (*i*) [So, taxes assessed without authority and paid to a collector, who has a tax bill and a warrant in form prescribed by law, authorizing him to levy directly upon the body or property of every individual whose name is borne upon the tax list, may be recovered back, on the ground that they are paid by compulsion. (*i*¹) In this, and other like cases, the party paying the money has no day in court, nor any opportunity to arrest the service of the warrant, by calling in question the validity of the proceedings ; but he is compelled to pay the money or have his property seized, or his body arrested, on the warrant of distress. (*i*²) So, it has been held that in all cases,

(*f*) *Wakefield v. Newbon*, 6 Q. B. 276 ; and see *Smith v. Sleap*, 12 M. & W. 585 ; *Pratt v. Vizard*, 5 B. & Ad. 808.

(*g*) *Close v. Phipps*, 7 M. & G. 586 ; and see *Frazer v. Pendlebury*, 31 L. J. C. P. 1.

(*h*) *Scarfe v. Hallifax*, 7 M. & W. 288, 290.

(*i*) *Valpy v. Manley*, 1 C. B. 594.

(*i*¹) [*Preston v. Boston*, 12 Pick. 7 ; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181 ; *Joyner v. Egremont*, 3 Cush. 567 ; *Dow v. Sudbury*, 5 Met. 497, 506 ; *Amesbury W. & C. Manuf. Co. v. Amesbury*, 17 Mass. 461 ; *Harvey v. Olney*, 42 Ill. 336. But where a tax is paid volun-

tarily, it cannot be recovered back, though illegal. *Morris v. Baltimore*, 5 Gill, 244. So in *Fellows v. School District in Fayette*, 39 Maine, 559, it was held that the payment of a tax, which may conscientiously be retained, with a full knowledge of all the facts, after one has been arrested for its non-payment, and discharged on his promise to pay it, is voluntary, and cannot be recovered back, notwithstanding informalities in its assessment.]

(*i*²) [*Joyner v. Egremont*, 3 Cush. 567, 572 ; *Preston v. Boston*, 12 Pick. 7, 14 ; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181, 188-190.]

where money has been paid under such duress or necessity as may give it the character of a payment by compulsion, — such as money paid to liberate a raft of lumber detained in order to exact an illegal toll, — it may be recovered back. (*i*³) So, where duties have been illegally exacted, and paid, in consequence of that exaction, to a collector of the revenue, they may be recovered back.] (*i*⁴)

But a landlord who distrains his tenant's goods for rent in arrear, and sells them, but is not guilty of any misconduct with regard to the distress, is not liable to the tenant in this action, for the over-plus of the sale which he does not leave in the hands of the sheriff, under the 2 W. & M. sess. 1, c. 5; the proper remedy being by an action against the landlord on the statute, for his neglecting so to do. (*k*) Nor does this action lie to recover money paid under protest, for the release of cattle taken *damage feasant*, even although the sum demanded for damage was excessive, unless the owner of the cattle previously tender sufficient amends. (*l*) And it is questionable whether this action will lie, even where sufficient amends have been tendered; because the law has provided specific means whereby the question can be better raised on the record, viz. by bringing a replevin, or an action for the wrongful taking or detention of the cattle. (*m*)

(*i*³) [Chase v. Dwinal, 7 Greenl. 134. In Ripley v. Geltson, 9 John. 201, the plaintiff recovered back from the collector of New York money illegally claimed and received by him as tonnage and light money, and which the plaintiff paid to obtain a clearance of his vessel. In Clinton v. Strong, 9 John. 370, money was reclaimed which had been wrongfully exacted by the clerk of the district court, for the redelivery of property which had been seized. The payments in these cases were considered as extorted and compulsory. See a like case in Irving v. Wilson, 4 T. R. 485. See, also, Alston v. Durant, 2 Strobb. 257; Baltimore v. Heffernan, 4 Gill. 425; Quinnett v. Washington, 10 Misso. 53; Forbes v. Appleton, 5 Cush. 118; Storer v. Mitchell, 45 Ill. 213.]

(*i*⁴) Maxwell v. Griswold, 10 How. (U. S.) 242; Marriott v. Brune, 9 How. (U. S.) 619; Elliott v. Swartwout, 10 Peters, 138. See Ripley v. Geltson, 9 John. 201; Irving v. Wilson, 4 T. R. 485; Abinger

C. B. in Atlee v. Backhouse, 3 M. & W. 645. In Maxwell v. Griswold, *supra*, Woodbury, J. said: "Indeed, it seems sufficient to sustain the action, under principles of the common law, if the duties exacted were not legal, and were demanded and were paid under protest." See Cunningham v. Monroe, 15 Gray, 471; Norris v. Boston, 4 Met. 284.]

(*k*) Yates v. Eastwood, 6 Exch. 805; Evans v. Wright, 2 H. & N. 527.

(*l*) Gulliver v. Cosens, 1 C. B. 788.

(*m*) Gulliver v. Cosens, *supra*; Lindon v. Hooper, Cowp. 414, cited in Hills v. Street, 5 Bing. 57. *Semble*, it lies to recover the amount of a tax which a landlord should, in distraining, have allowed his tenant, and which the latter pays to redeem his goods. Graham v. Tate, 1 M. & S. 609; Spragg v. Hammond, 2 B. & B. 59. Trover lies if, in order to recover back goods wrongfully distrained for rent, the owner pay the sum distrained for. Shipwick v. Blanchard, 6 T. R. 298.

12. Where there is an *executory* illegal contract, and the plaintiff dissents from or disavows such contract before its completion, he may recover back any money which he may have paid to the other party thereunder, in an action for money had and received. (*n*) Thus, where a premium has been paid to the other contracting party on an illegal insurance, or where a sum of money has been deposited on a wager; if the plaintiff—before the risk on the policy begins, or his chance of winning the wager can be ascertained, or the wager itself be decided—disaffirm and rescind the contract, he may maintain an action against the other party, to recover back the amount he has paid, as money had and received to his use. (*o*)

But the election to rescind must be notified in due time; and an assured, upon a policy effected in terms sufficiently large to comprehend an illegal adventure, and who intended thereby to cover an illegal adventure, cannot recover back the premium, unless, before bringing the action, he give some formal notice to the underwriter of his renunciation of the contract, even although the adventure be never entered upon. Therefore, on a policy “on goods on board the *Andaz*, a Spanish ship, or any other ship or ships, at and from New Orleans and Pensacola to a port in the United Kingdom,” — New Orleans, at the

(*n*) *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 Ib. 290; *Lowry v. Bourdieu*, 2 Dougl. 470; *Williams v. Hedley*, 8 East, 380, *n.* (*a*); *Clarke v. Shee*, Cowp. 200; *Browning v. Morris*, Ib. 792; *Tapscott v. Randall*, 2 B. & P. 467; per *Bayley and Littledale JJ.* *Hastelow v. Jackson*, 8 B. & C. 217, 224, 226. [See *Alston v. Durant*, 2 Strobb. 257; *White v. Franklin Bank*, 22 Pick. 184, 185. Where, upon the deposit of money in a bank, the depositor received a book containing the cashier's certificate thereof, in which it was stated that the money was to remain in deposit for a certain time, and such agreement was illegal and void, it was held that no action could be maintained by the depositor against the bank upon such express contract, but that he might recover back the money in an action commenced before the expiration of the time for which it was to remain in deposit, the

parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained without a previous demand. *White v. Franklin Bank*, *supra*. See *Lowell v. Boston & Lowell Railroad Corp.* 23 Pick. 32, 33; *Worcester v. Eaton*, 11 Mass. 377; *Utica Insurance Co. v. Scott*, 19 John. 1; *Utica Insurance Co. v. Caldwell*, 3 Wend. 296; *Utica Insurance Co. v. Bloodgood*, 4 Wend. 652; *Skinner v. Henderson*, 10 Missou. 205; *Staples v. Gould*, 5 Selden (N. Y.), 520; *Curtis v. Leavitt*, 15 N. Y. 9. Money fairly lost at play cannot be recovered back in an action for money had and received, *not founded on the statute*. *Thistlewood v. Cracroft*, 1 M. & S. 500. A premium paid on a wagering policy is not recoverable after the event. *Paterson v. Powell*, 9 Bing. 320.]

(*o*) *Smith v. Bickmore*, 4 Taunt. 477, 478.

time of effecting the policy, belonging to America, which was at war with this country; but Pensacola belonging to Spain, which was neutral, and the assured intending by the policy to cover an importation of cotton wool from New Orleans to Liverpool; it was held that, supposing this to be a case in which the assured was at liberty to rescind the contract, yet as he had not given any notice to the underwriter of his intention to do so, he could not maintain an action to recover back the premium, although no cargo had been loaded on board the ship named, nor on board any other ship covered by the policy. (*p*)

And the rule as to the recovery of money which has been paid to a stakeholder, in pursuance of an illegal contract, has been already considered. (*q*)

But where an *illegal* contract has been *executed*, and both parties are *in pari delicto*, no action lies to recover back money paid under it. (*q*¹) Thus, if money be paid under an agreement, the object of which is to compromise an offence of a public nature; the party by whom it was paid cannot maintain this action to recover it back, even although the proceedings against him should prove to be defective and void. (*r*) And so, money lent for the purpose of illegal gaming, (*s*) or paid as premiums on an illegal insurance, is not recoverable. (*t*)

(*p*) *Palyart v. Leckie*, 6 M. & S. 290.

(*q*) See *Hodson v. Terrill*, 1 C. & M. 802; [*ante*, 736, note (*q*), and cases cited, 919, note (*r*), and cases cited. In Maine, where all wagers are unlawful (*Lewis v. Littlefield*, 15 Maine, 233), if money lost on a wager has not been paid over by the stakeholder, he is liable to the loser for the amount by him deposited, upon demand and notice, as well after as before the happening of the event. *Stacy v. Foss*, 19 Maine, 335. See *McKee v. Manice*, 11 Cush. 357.]

(*q*¹) [*Boutelle v. Melendy*, 19 N. H. 196; *Greenwood v. Curtis*, 6 Mass. 381; *Pearson v. Lord*, 6 Mass. 81; *Worcester v. Eaton*, 11 Mass. 368; *Denny v. Lincoln*, 5 Mass. 385; *Perkins v. Savage*, 15 Wend. 412; *Burt v. Place*, 6 Cowen, 431; *Best v. Strong*, 2 Wend. 319; *M'Keon v. Caherty*, 1 Hall, 300; *Barnard v. Crane*, 1 Tyler, 457; *Babcock v. Thompson*, 3 Pick. 446; *Spalding v. Bank of Muskingum*, 12 Ohio, 544; *Mills v. Western*

Bank, 10 Cush. 22; *White v. Hunter*, 23 N. H. 128. Money paid in consideration of the composition of a felony cannot be recovered back. *Worcester v. Eaton*, 11 Mass. 368; *S. P. Merwin v. Huntington*, 3 Conn. 209. So money paid on a contract in violation of the statute to prevent champerty, &c. *Best v. Strong*, 2 Wend. 319. See *Perkins v. Savage*, 15 Wend. 412; *Denny v. Lincoln*, 5 Mass. 385; *Cary v. Prentice*, 1 Root, 91; *Utica Ins. Co. v. Kip*, 8 Cowen, 20. Money paid to a town for the office of constable, it having been put up to auction prior to the choice, cannot be recovered back. *Groton v. Waldborough*, 2 Fairf. 306.]

(*r*) *Goodall v. Lowndes*, 6 Q. B. 464.

(*s*) *Allport v. Nutt*, 1 C. B. 974; *M'Kinnell v. Robinson*, 3 M. & W. 441. Money *fairly* lost at play cannot be recovered back in an action for money had and received, *not founded on the statute*. *Thistlewood v. Cracroft*, 1 M. & S. 500.

(*t*) See *Howson v. Hancock*, 8 T. R.

Rule where contract is executed.

And it would seem that the statement of an account, in which the money due by the terms of the illegal contract is allowed, is, for the purposes of this rule, equivalent to payment thereof. (u)

13. Nor does this action lie, to recover money which has been paid to the plaintiff under a *bonâ fide* legal process, although it be afterwards discovered that the money was not due, and the original defendant, by finding a lost receipt or the like, be in a situation to prove that fact. (v) Nor is

Money unjustly recovered at law.

575; *Andrée v. Fletcher*, 3 T. R. 266; *Vandyck v. Hewitt*, 1 East, 97; *Lubbock v. Potts*, 4 East, 449. A premium paid on a wagering policy, is not recoverable after the event. *Paterson v. Powell*, 9 Bing. 320.

(u) *Owens v. Denton*, 1 Cr., M. & R. 712.

(v) *Marriott v. Hampton*, 7 T. R. 269; *Duke de Cadaval v. Collins*, 4 A. & E. 858, 867; *Belcher v. Mills*, 2 Cr., M. & R. 150; *Kist v. Atkinson*, 2 Camp. 63; [Broom's Legal Maxims, 131; *Gordon v. Baltimore*, 5 Gill, 231; *Brunson v. Bacon*, 1 Root, 210; *Morton v. Chandler*, 7 Greenl. 45; *Loring v. Mansfield*, 17 Mass. 394; *Carter v. Canterbury*, 3 Conn. 461; *Homer v. Fish*, 1 Pick. 439; *Peck v. Woodbridge*, 3 Day, 36; *Loomis v. Pulver*, 9 John. 244; *Smith v. Whiting*, 11 Mass. 445; *Walker v. Ames*, 2 Cowen, 428; *Job v. Collier*, 11 Ohio, 422. Where part payment has been made, and the whole debt is afterwards collected by law, such part payment constitutes no debt, and cannot be recovered back. This is said, however, to be *stricti juris*. *Strong v. McConnel*, 10 Vt. 232, 233; *Tilton v. Gordon*, 1 N. H. 33; *Loring v. Mansfield*, 17 Mass. 394; *De Sylvia v. Henry*, 3 Porter, 132; *Thatcher v. Gammon*, 12 Mass. 271; *Mitchell v. Sandford*, 11 Ala. 695; *James v. Cavit*, 2 Brevard, 174; *Fuller v. Shattuck*, 13 Gray, 70, overruling *Rowe v. Smith*, 16 Mass. 306; *Sacket v. Loomis*, 4 Gray, 148; *Nettleton v. Beach*, 107 Mass. 499. But in *Snow v. Prescott*, 12 N. H. 535, it appeared that it was agreed between the vendor and vendee of certain goods, that the price of them should be in-

dorsed upon a note held by the vendee against the vendor; the goods were delivered, but the price of them was not indorsed upon the note. The holder of the note, being the vendee of the goods, afterwards brought an action upon it, recovered judgment by default, and enforced its payment by execution; and it was held, that the vendor of the goods might recover the price of them in an action for goods sold and delivered. See *Fuller v. Little*, 7 N. H. 535; *Pierce v. Duncan*, 22 N. H. 18; *Deming v. Cummings*, 11 N. H. 474; *Brown v. Mahurin*, 39 N. H. 156, 162; *Warren v. Buckminster*, 24 N. H. 336; *Nettleton v. Beach*, 107 Mass. 499. In *Fowler v. Shearer*, 7 Mass. 14, it was held, that where an attorney had a promissory note committed to him for collection, and having received a partial payment of the debtor, paid it over to the creditor without indorsing it on the note, and afterwards obtained judgment on the note for the whole amount, the attorney would be liable to the debtor for the amount of such partial payment, in an action for money had and received. The court, in this case say, that "where the defendant (the attorney) proceeded, and took judgment without deducting the payment, he was guilty of a breach of trust reposed in him by the plaintiff; and for this breach he ought to refund the money to the plaintiff." See, also, *Whitcomb v. Williams*, 4 Pick. 228. Money paid in pursuance of an award of arbitrators, even under a parol submission, cannot be recovered back, unless the award were obtained by some artifice or fraud of the other party. *Newburyport M. Ins. Co. v. Oliver*, 8 Mass.

this action maintainable to recover money paid, by mistake, into court; (x) or money levied under a *fieri facias*, which was only irregular, and has not been set aside. (y)

Nor can money which was levied by a regular execution, under a judgment valid on the face of it, be recovered back in this action, on the ground that the judgment was signed, or the execution issued, fraudulently, for the whole sum named in the judgment, although part of it had been already paid. (z)

But this action lies to recover money paid under a *void* authority, *e. g.* under the sentence of a court which had *no* jurisdiction whatever over or in respect of the subject-matter. (a) And it also lies to recover money paid in order to be released from an illegal arrest; as in the case of a party who is privileged from arrest; (b) or money paid under process which the plaintiff has used colorably, and with knowledge that the debt claimed did not exist. (c)

402; *S. P. Homes v. Aery*, 12 Mass. 134; *Bulkley v. Stewart*, 1 Day, 130. But money paid on a judgment, that is afterwards reversed or vacated, may be recovered back in this action. *Stevens v. Fitch*, 11 Met. 248; *Homer v. Barrett*, 2 Root, 156; *Sturges v. Allis*, 10 Wend. 354; *Duncan v. Ware*, 5 Stew. & Port. 119; *Green v. Stone*, 1 Harr. & J. 405; *Clark v. Pinney*, 6 Cowen, 297; *Duncan v. Kirkpatrick*, 13 Serg. & R. 292; *Jamaica v. Guilford*, 2 Chip. 103; *Lyman v. Edwards*, 2 Day, 153; *Maghee v. Kellogg*, 24 Wend. 32. See *Wilbur v. Sproat*, 2 Gray, 431. So where money is paid on an execution issued on a satisfied judgment. *Wisner v. Bulkley*, 15 Wend. 321. And the action lies against the real and not the nominal plaintiff on the suit in which the judgment is reversed. *Maghee v. Kellogg*, 24 Wend. 32. So the real defendant, who pays a judgment recovered against the nominal defendant, which is afterwards vacated, may maintain this action, in his own name, to recover back the amount of such judgment. *Stevens v. Fitch*, 11 Met. 248. Where the supreme court of Pennsylvania reversed a judgment, and ordered a *venire de novo*, and the defendant in error paid the cost on such reversal, in order to take down the record to the common pleas, where the cause was again tried, and

judgment was rendered in his favor; it was held, that he might afterwards maintain assumpsit against the plaintiff in error to recover back the costs so paid by him. *Hamilton v. Aslin*, 3 Watts, 222. If a defendant acting *bonâ fide*, and without connivance with the plaintiff, is compelled in due course of law to pay what another, and not the plaintiff, is entitled to, he may, in an action by that other against him to recover the same money, plead the former judgment in bar. The money so recovered is to be considered as money had and received to the use of the real owner, who may maintain assumpsit against the person so receiving. *Mayer v. Foulkrod*, 4 Wash. C. C. 503.]

(x) *Malcolm v. Fullarton*, 2 T. R. 645.

(y) *Habberton v. Wakefield*, 4 Camp. 58.

(z) *De Medina v. Grove*, 10 Q. B. 152.

[See *Roth v. Schloss*, 6 Barb. 308; *Anderson v. Gage*, *Dudley* (S. Car.), 319; *Hale v. Passmere*, 4 Dana, 70.]

(a) *Newdigate v. Davy*, 1 Ld. Raym. 742; *Lindon v. Hooper*, *Cowp.* 419; *Thurston v. Mills*, 16 East, 270.

(b) *Pitt v. Coombes*, 2 A. & E. 459.

(c) *Duke de Cadaval v. Collins*, 4 A. & E. 858. [Where any person is arrested for a just cause, and by lawful authority, for an improper purpose, any money he may pay for his enlargement may be con-

And it seems that if a party, with full knowledge of the facts, pay a sum of money which is sought to be recovered by action, at any time after proceedings have been actually commenced, this will be regarded as a payment under legal process, within the meaning of the rule which we are now considering; so that, if there has been no fraud, it cannot be recovered back. (*d*)

But where a certificated bankrupt, on being arrested for a debt which was provable under the commission, paid the money under protest, at the same time stating his bankruptcy and commission, and warning the sheriff that he would apply to the court to have his money paid back; it was held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money so paid. (*e*)

14. The action for money had and received is also maintainable, to recover from a party who has wrongfully received the known and accustomed *fees* of an *office* which the plaintiff holds, or is entitled to hold, the amount of fees of which such party has wrongfully possessed himself. (*f*)

And it would appear that the right to an office may be tried in this form of action. (*g*)

considered as paid by duress of imprisonment, and may be recovered back in an action for money had and received. *Severance v. Kimball*, 8 N. H. 386. See *Richardson v. Duncan*, 3 N. H. 511; *Alexander v. Pierce*, 10 N. H. 497; *Burnham v. Spooner*, 10 N. H. 532; *Foshay v. Ferguson*, 5 Hill, 154. The fear of imprisonment is sufficient to constitute duress *per minas*. *Foshay v. Ferguson*, *ubi supra*.]

(*d*) *Hamlet v. Richardson*, 9 Bing. 644, 647; [*Benson v. Monroe*, 7 Cush. 125.] See per *Holroyd J.* *Milnes v. Duncan*, 6 B. & C. 671, 679; per *Abbott C. J.* *Miles v. Dell*, 3 Stark. 25, 26; and see *Dupen v. Keeling*, 4 C. & P. 102. But in *Cobden v. Hendrick*, 4 T. R. 432, note (*a*), Lord Kenyon drew a distinction between money paid to *compromise* an action, and money paid under the *judgment* of a court. This distinction, however, would appear to be

unfounded. See *Hamlet v. Richardson*, *supra*; and 2 Smith L. C. 240 b.

(*e*) *Payne v. Chapman*, 4 A. & E. 364.

(*f*) Per Lord Kenyon, *Boyter v. Dods-worth*, 6 T. R. 681, 683; and see *Spry v. Emperor*, 6 M. & W. 639; *King v. Alston*, 12 Q. B. 971; 18 L. J. Q. B. 59; *Shoubridge v. Clark*, 12 C. B. 335; *Rowland v. Hall*, 1 Scott, 539.

(*g*) See *Arris v. Stukely*, 2 Mod. 260; *Howard v. Wood*, Sir T. Jones, 126; S. C. 2 Lev. 245; per *Heath J.* *Lightly v. Clouston*, 1 Taunt. 114, 115; and per Lord Kenyon C. J. *Green v. Hewitt*, Peake, 182, 185; [*Allen v. M'Kean*, 1 Sumner, 317.] In *Lamine v. Dorvell*, 2 Ld. Raym. 1217, Holt C. J. seems to have admitted this doctrine; but he mentioned a case in which eminent counsel denied it, and said the action had crept in by degrees.

But this action will not lie by the nominee of a perpetual curacy, to recover the profits thereof from a party who was in possession and who likewise claimed to be curate; (*h*) although it will lie in the case of a donative, because there the party is in full possession immediately on his being nominated. (*i*)

Nor can this action be maintained to recover mere *gratuities*, received by the intruder from third persons for services rendered by him in exercising the plaintiff's office; such gratuities not being certain and appropriated fees annexed to the office. (*j*)

15. The *plaintiff* in an action may sue the *sheriff* or his executors, for money received by him or his bailiff (*k*) under a *fieri facias*, (*l*) without ruling him to return the writ ^{Against} *sheriffs, &c.* or demanding the money. (*m*) And it has been said, that the action may be brought as soon as the money is paid, and before the return of the writ. (*n*)

But a mere *seizure*, without a sale of the goods, will not charge the sheriff in an action for money had and received. (*o*) And if, after having seized goods under the plaintiff's writ of *fieri facias*, he sell them, though irregularly, under another process of the court, at the suit and for the benefit of another party, an action for money had and received cannot be maintained against him by the first plaintiff. (*p*)

So, the proceeds of the sale become money had received to the use of the party under whose process it was effected; (*q*) and if there be a balance remaining after the plaintiff's execution is satis-

(*h*) *Powell v. Milbank*, 1 T. R. 399, note.

(*i*) *Rex v. Bishop of Chester*, 1 T. R. 396, 403.

(*j*) *Boyter v. Dodsworth*, 6 T. R. 681.

(*k*) *Underhill v. Wilson*, 6 Bing. 697. *Aliter* where the bailiff acted expressly for and under the directions of the plaintiff himself. *Cook v. Palmer*, 6 B. & C. 739; *Crowder v. Long*, 8 B. & C. 599; *Tidd*, 9th ed. 1019; *Higgins v. M'Adam*, 3 Y. & J. 1.

(*l*) *Longhill v. Jones*, 1 Stark. 345; *M'Neill v. Perchard*, 1 Esp. 263; [*Armstrong v. Carrow*, 6 Cowen, 465.]

(*m*) *Dale v. Birch*, 3 Camp. 347; *Tidd*,

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9th ed. 1019. But if the sheriff be sued without any prior demand of the sum levied, the court will, on application, stay the proceedings against him, on payment of that sum without costs. *Jefferies v. Sheppard*, 3 B. & Ald. 696.

(*n*) See per *Littledale J.* *Morland v. Pellatt*, 8 B. & C. 722, 727; *sed vide per Parke J. Ib.*, and *Morland v. Leigh*, 1 Stark. 388; [*Crane v. Dygert*, 1 Wend. 534; *S. C.* 4 Wend. 675.]

(*o*) *Thurston v. Mills*, 16 East, 254, 274.

(*p*) *Ib.* See *Reed v. James*, 1 Stark. 134.

(*q*) *Swain v. Morland*, 1 B. & B. 370.

fied, "such balance becomes a debt from the sheriff to the execution debtor. (r)

So, if the sheriff wrongfully seize and sell the goods of a third person under an execution, the latter may sue him for money had and received; and he will make out a *prima facie* case by merely proving his, the plaintiff's *possession* of the goods at the time of the seizure. Thus, in the case of *Oughton v. Seppings*, (s) a sheriff's officer had wrongfully seized, under a *fi. fa.* against A., a horse belonging to B. The horse was sold by the sheriff, and the money paid over to the officer. B. brought an action for money had and received, against the officer, to recover the amount; and the case she proved was, that the horse had belonged to her husband, and that after his death she had provided for its keep; but no letters of administration were produced: and yet it was held, that there was sufficient evidence to entitle her to recover.

So, if the sheriff seize and sell goods under a *fi. fa.*, and pay the proceeds of the sale to the execution creditor, after notice of an act of bankruptcy committed by the defendant, his assignees or trustee may sue the sheriff for money had and received. (t)

4. Interest.

The form of the common count for interest is, that the plaintiff Interest at common law. sues the defendant "for money payable by the defendant to the plaintiff, for interest for the forbearance by the plaintiff to the defendant, at his request, of moneys due from the defendant to the plaintiff." (u)

The general common law rule is, that the law does not *imply* a contract on the part of a debtor, to pay interest on the sum he owes, although the debt may be of a fixed amount, and may have been frequently demanded. (x) Nor, in the absence of express stipulation,

(r) *Harrison v. Paynter*, 6 M. & W. 387.

(s) 1 B. & Ald. 241.

(t) *Notley v. Buck*, 8 B. & C. 160. [So, if after a *supersedeas* of an execution has been shown to the sheriff, he compels the party to pay the amount of the execution, he acts without authority, and the money may be recovered back in an action for money had and received. *Hopkinson v. Scars*, 14 Vt. 494.] As to the sheriff taking an indemnity, see *Young v. Marshall*, 8 Bing. 43.

(u) See *Nordenstrom v. Pitt*, 13 M. & W. 723. A count for interest should be inserted, where it is claimed as a debt. *Ashby v. Ashby*, 3 M. & P. 186. In other cases it may be recovered as damages. *Hudson v. Fawcett*, 7 M. & G. 348; *Fruhling v. Shroeder*, 2 Bing. N. C. 77; *Berlington v. Phillips*, 1 M. & W. 48.

(x) *De Havilland v. Bowerbank*, 1 Camp. 50; *De Bernales v. Fuller*, 2 Ib. 426; *Walker v. Constable*, 1 B. & P. 307; *Page v. Newman*, 9 B. & C. 378, 380. [Where there is no express contract to pay

is interest due as a matter of right, even upon money payable under a written instrument, except in the case of commercial instruments

interest, it is not recoverable except upon the presumption that the debt should have been sooner paid. *Brainerds v. Champlain Transp. Co.* 29 Vt. 154. But according to the American authorities, interest will be allowed after a demand of payment of an unsettled claim for goods sold and delivered, or services rendered, from the time of the demand; and a presentment of the account or commencement of a suit is sufficient demand upon which to found, and from which to date, a claim of interest. *Barnard v. Bartholomew*, 22 Pick. 291, 294; *McIlvaine v. Wilkins*, 12 N. H. 481 *et seq.*; *Ames v. Wilson*, 22 Maine, 116, 120; *Selleck v. French*, 1 Conn. 32; *Gray v. Van Amringe*, 2 Watts & S. 128; *Moore v. Patten*, 2 Porter, 451, 454; *Houghton v. Hagar*, Brayt. 133; *Bates v. Starr*, 2 Vt. 536; *Cole v. Trull*, 9 Pick. 325; *Goff v. Rehoboth*, 2 Cush. 475; *David v. Conard*, 1 Iowa (Greene), 336. In *National Lancers v. Lovering*, 20 N. H. 511, it was held, that interest might be recovered in an action for goods sold and delivered, where the time of payment was agreed upon by the parties, from the period so fixed, by way of damages for the wrongful detention of the money after that date. But if there be a certain term of credit given, or a usage, or an understanding between the parties, arising out of their mode of dealing or otherwise, that payment is not to be made till a particular period, such usage, understanding, or agreement will, of course, govern the claim of interest. *Moore v. Patten*, *ubi supra*; *Cannon v. Warren*, 2 Porter, 351; *M'Allister v. Reab*, 8 Wend. 109; *Raymond v. Isham*, 8 Vt. 258; *Esterly v. Cole*, 3 Comst. 502; *Wood v. Smith*, 23 Vt. 706. Interest is allowed on a merchant's account from the time the credit given has expired. *Raymond v. Isham*, 8 Vt. 258; *Porter v. Munger*, 22 Vt. 191; *Selleck v. French*, 1 Conn. 32; *National Lancers v. Lovering*, 20 N. H. 511. And this term of credit is sometimes inferred

from the usage of the place where the dealings are had. *Roons v. Miller*, 3 Watts & S. 271; *Selleck v. French*, 1 Conn. 32; *Esterly v. Cole*, 3 Comst. 502; *Bate v. Burr*, 4 Harring. 130. Accounts for money advanced, lent, or expended, for the use of another, at his request, generally bear interest. See *Ilseley v. Jewett*, 2 Met. 168; *Gibbs v. Bryant*, 1 Pick. 118; *Liotard v. Graves*, 3 Caines, 226; *Reid v. Rensselaer Glass Factory*, 3 Cowen, 393; *S. C.* 5 Ib. 589; *Dilworth v. Sinderling*, 1 Binney, 488, 494; *Weeks v. Hasty*, 13 Mass. 218; *Sims v. Willing*, 8 Serg. & R. 103, 109; *Miles v. Bacon*, 4 J. J. Marsh. 457; *Breckenridge v. Taylor*, 5 Dana, 110, 114; *Goodloe v. Clay*, 6 B. Mon. 236; *Cheeseborough v. Hunter*, 1 Hill (S. Car.), 400; *Taylor v. Knox*, 1 Dana, 391, 399; *Selleck v. French*, 1 Conn. 32. But money lent, without any stipulation for interest, does not necessarily draw interest, until refusal or neglect of payment, after demand made, or some other default of the borrower. *Hubbard v. Charlestown Branch Railroad Co.* 11 Met. 124. Interest is not necessarily recoverable on money obtained from a bank by an over-draft. *Ib.* If money is wrongfully or fraudulently obtained from a bank, it may be recovered back with interest. *Wood v. Robbins*, 11 Mass. 504; *Hubbard v. Charlestown Branch R. R. Co.* 11 Met. 124. Whether interest shall be recovered in an action for money had and received, seems to depend on the circumstances of each case. A mere stakeholder, agent, trustee, or bailee, in whose hands money has been deposited and retained without use or default on his part, would not be liable for interest. But where the money of one person has been detained wrongfully, or been used, by another, or where it has been kept by him when it should have been paid over, interest is properly chargeable in an action to recover it. See *Dodge v. Perkins*, 9 Pick. 369; *Knight v. Reese*, 2 Dallas, 182; *Bell v. Logan*, 7 J. J. Marsh. 503, 504; *Vance*

of a negotiable nature, such as bills of exchange and promissory notes. (*y*)

Thus, *primâ facie*, interest is not claimable on a demand for goods sold, although the price was to have been paid on a certain day ; (*z*) or on a balance struck on an account for goods sold ; (*a*) or on a debt due for work and materials ; (*b*) or for money lent to, (*c*) or paid for, the defendant ; (*d*) or had and received by him, though fraudulently, for the plaintiff's use. (*e*)

v. Vance, 5 Monroe, 521 ; *Selleck v. French*, 1 Conn. 33 ; *Johnson v. Eicke*, 7 Halsted, 316 ; *Marion v. McRea*, 1 Cheves (Law), 61 ; *Wood v. Robbins*, 11 Mass. 504 ; *Everts v. Nason*, 11 Vt. 122 ; *Hudson v. Tenney*, 6 N. H. 456. Where a party has received or retained money of another wrongfully, interest is recoverable from the time it was wrongfully received in the first case, and from the time it was wrongfully retained in the other. *Chauncey v. Yeaton*, 1 N. H. 151 ; *Wood v. Robbins*, 11 Mass. 504 ; *Winslow v. Hathaway*, 1 Pick. 211 ; *Greenly v. Hopkins*, 10 Wend. 96 ; *Lynch v. Deviar*, 3 John. Ca. 303 ; *Simpson v. Feltz*, 1 McCord Ch. 213 ; *Shipman v. Miller*, 2 Root, 405 ; *Selleck v. French*, 1 Conn. 32 ; *Hawkins v. Johnson*, 4 Blackf. 23. But on open and current accounts between parties no interest is chargeable, except in cases of money advanced, expended, &c., as above stated. A balance must be struck, and notice given in some way by presentment of the account, by demand of payment, or by suit brought for the balance. See *Raymond v. Isham*, 8 Vt. 258 ; *Crawford v. Willing*, 4 Dallas, 286 ; *Selleck v. French*, 1 Conn. 34 ; *Wiltburger v. Randolph*, Walker (Miss.), 20 ; *Shewell v. Givan*, 2 Blackf. 314 ; *Surton v. Gilliam*, 1 Scam. 579 ; *McKnight v. Dunlop*, 4 Barb. 36. An account current, received and not objected to within a reasonable time, becomes a settled account bearing interest from the time it is stated. *Bainbridge v. Wilcox*, 1 Baldwin, 536 ; *Crosby v. Otis*, 32 Maine, 256. Where money is payable on demand, interest does not accrue until demand is made. *Lewis v. Lewis*, 2 Hayw. 32 ; *Free-*

land v. Edwards, Ib. 49 ; *Dodge v. Perkins*, 9 Pick. 369 ; *Hunt v. Nevers*, 15 Pick. 500 ; *Brewer v. Tyringham*, 12 Pick. 547 ; *Haven v. Foster*, 9 Pick. 112 ; *Breyfogle v. Beckley*, 16 Serg. & R. 264 ; *Bartlett v. Marshall*, 2 Bibb, 467, 471 ; *Nelson v. Cartmel*, 6 Dana, 7 ; *Wells v. Abernethy*, 5 Conn. 222, 228 ; *Vaughan v. Goode*, Minor, 417. Where no other demand is made, the commencement of a suit for the money will be regarded as a demand for the purpose of computing interest. *Dodge v. Perkins*, *Hunt v. Nevers*, and other cases cited above.]

(*y*) *Page v. Newman*, 9 B. & C. 378, 380 ; *Foster v. Weston*, 6 Bing. 709.

(*z*) *Gordon v. Swain*, 12 East, 419 ; *Marshall v. Poole*, 13 East, 99 ; *De Bernales v. Fuller*, 2 Camp. 428, 429 ; *Calton v. Bragg*, 15 East, 255. [See *Sammis v. Clark*, 13 Ill. 544 ; *Hill v. Allen*, 13 Ill. 592.]

(*a*) *Chalie v. Duke of York*, 6 Esp. 45. [But see *Crosby v. Otis*, 32 Maine, 256.]

(*b*) *James v. Cotton*, 7 Bing. 273. See *Trelawney v. Thomas*, 1 H. Bl. 305 ; *Blaney v. Hendrick*, 3 Wils. 205.

(*c*) *Calton v. Bragg*, 15 East, 223 ; *Gwyn v. Godby*, 4 Taunt. 346 ; although the money was lent on a written contract to repay it at a time depending on a contingency ; *Page v. Newman*, 9 B. & C. 378.

(*d*) *Carr v. Edwards*, 3 Stark. 132.

(*e*) *Fruhling v. Schroeder*, 2 Bing. N. C. 77 ; *De Bernales v. Fuller*, 2 Camp. 420 ; *Crockford v. Winter*, 1 Ib. 129 ; *De Havilland v. Bowerbank*, Ib. 50 ; *Walker v. Constable*, 1 B. & P. 307 ; *Tappenden v. Randall*, 2 Ib. 472 ; *Goodchild v. Fen-*

Nor is interest necessarily payable on a guaranty ; (*f*) or on a sum insured on a ship, or on life ; (*g*) or in an action on a foreign judgment ; (*h*) or on an attorney's bill ; (*i*) or upon a deed or cov-

ton, 3 Y. & J. 481 ; [Reab *v.* M'Allister, 8 Wend. 109 ; Wood *v.* Hickok, 2 Wend. 501 ; Feeter *v.* Heath, 11 Wend. 477 ; Dox *v.* Dey, 3 Wend. 356 ; Tucker *v.* Ives, 6 Cowen, 193. Interest is to be allowed upon money paid at the request and to the use of another, from the time of payment. Gibbs *v.* Bryant, 1 Pick. 118 ; Reid *v.* Rensselaer Glass Man. Co. 3 Cowen, 436 ; S. C. 5 Cowen, 587 ; Fowler *v.* Shearer, 7 Mass. 14 ; Weeks *v.* Hasty, 13 Mass. 218 ; Davenport *v.* Mason, 15 Mass. 85 ; Campbell *v.* Musier, 6 John. Ch. 24 ; Rector *v.* Mark, 1 Miss. 288 ; Barnard *v.* Bartholomew, 22 Pick. 291 ; Ilsley *v.* Jewett, 2 Met. 168. In Dodge *v.* Perkins, 9 Pick. 368, it was held, that if an agent, having received money, unreasonably neglects to inform his employer of it, he is liable for interest from the time when he ought to have given information ; and it was further held, that whenever the law by implication makes it the duty of the party to pay over the money to the owner, without any previous demand on his part, interest is to be allowed. See Ellery *v.* Cunningham, 1 Met. 112, 116. The subject of interest is very fully examined in the above case of Dodge *v.* Perkins. See also Williams *v.* American Bank, 4 Met. 317 ; People *v.* Gasherie, 9 John. 71 ; Pease *v.* Barber, 3 Caines, 266 ; Porter *v.* Bussey, 1 Mass. 436 ; Wood *v.* Robbins, 11 Mass. 504 ; Taylor *v.* Knox, 1 Dana, 398 ; Hauxhurst *v.* Hovey, 26 Vt. 544. In Pennsylvania, interest is recoverable in assumpsit for money had and received : on money paid by mistake from the time of explanation and payment redemanded ; King *v.* Diehl, 9 Serg. & R. 409 : in assumpsit for work and labor ; in an action on a policy of insurance ; Obermyer *v.* Nichols, 6 Binn. 162 ; and in assumpsit for money lent and advanced ; Dibworth *v.* Sinderling, 1 Binn. 488 : on rent from

the time it falls due : on an open account, where a certain time is fixed for payment, and generally in all cases where one person obtains money belonging to another. Obermyer *v.* Nichols, *ubi supra*. Where there is no usage, no precise time of payment fixed, no account rendered, or demand made, it is not usual for the court to direct interest in the name of interest, but to leave it to the jury under all the circumstances of the case to give or refuse damages for the detention of the debt. Eckert *v.* Wilson, 12 Serg. & R. 393. See, also, Graham *v.* Williams, 16 Serg. & R. 257 ; Fashott *v.* Reed, 16 Serg. & R. 266 ; Wiltburger *v.* Randolph, Walker (Miss.), 20.]

(*f*) Hare *v.* Richards, 7 Bing. 254.

(*g*) Kingston *v.* M'Intosh, 1 Camp. 518 ; Higgins *v.* Sargent, 2 B. & C. 348 ; Bain *v.* Case, Moo. & M. 262 ; S. C. 3 C. & P. 496.

(*h*) Hilhouse *v.* Davis, 1 M. & S. 173. As to interest on a Scotch judgment, Arnott *v.* Redfern, 3 Bing. 353 ; or Irish judgment, Bann *v.* Dalzell, 3 C. & P. 376 ; S. C. Moo. & M. 228. In action on a Jamaican judgment (Atkinson *v.* Lord Braybrook, 4 Camp. 380 ; S. C. 1 Stark. 219), Lord Ellenborough would not allow interest, and said the judgment constituted only a simple contract debt. On an English judgment whether equity allows interest, Lewes *v.* Morgan, 3 Y. & J. 394. As to interest in India, see 3 Bing. 193. In the Scotch courts interest is, it seems, allowed. Arnott *v.* Redfern, 3 Bing. 353 ; Foster *v.* Weston, 6 Ib. 711, 714. [Interest was allowed in New Hampshire on a judgment of a justice of the peace of another state, where a recovery was had upon it in New Hampshire. Mahurin *v.* Bickford, 6 N. H. 567. Interest is allowable upon verdicts and awards up to the time of the rendition of judgment where delay has occurred. Winthrop *v.* Curtis, 4 Greenl.

(*i*) Walker *v.* Bayley, 2 B. & P. 219.

enant for the payment of money, even by instalments, (*k*) unless there be a penalty ; or upon a *replevin* bond ; (*l*) or upon a recognizance of bail in the queen's bench ; (*m*) or upon a sum due on a balance of accounts. (*n*) And, generally speaking, money deposited with a banker does not carry interest. (*o*)

But in some cases the common law does give interest ; as upon bills of exchange and promissory notes, where the claim to it is supported by mercantile usage. (*p*) Thus, the acceptor of a bill, and the maker of a note, are respectively liable to pay interest thereon, in the nature of damages, (*q*) from the time the instrument became due ; although interest be not reserved on the face of it, and there be no proof of any demand of payment. (*r*) And, in the case of a note payable on de-

297 ; *Sproat v. Cutler*, Wright, 157. So, interest is allowed in an action of debt on a judgment from the time of the rendition of the first judgment. *Williams v. American Bank*, 4 Met. 322 ; *Fishburne v. Sanders*, 1 Nott & McCord, 242 ; *Pinckney v. Singleton*, 2 Hill (S. Car.), 343 ; *Rogers v. McDearmid*, 7 N. H. 506 ; *Hodgdon v. Hodgdon*, 2 N. H. 169 ; *Sayre v. Austin*, 3 Wend. 496 ; *Watson v. Fuller*, 6 John. 283 ; *Van Wyck v. Montrose*, 12 John. 350 ; *Geltson v. Hoyt*, 13 John. 561 ; *Williams v. Smith*, 2 Caines, 253 ; *Constable v. Colden*, 2 John. 480 ; *Mason v. Fakle*, 1 Breese, 52 ; *Prince v. Lamb*, 1 Breese, 299. The rule applies where the original judgment is for a cause of action, that does not bear interest, as for unliquidated damages. *Klock v. Robinson*, 22 Wend. 157 ; *Lord v. Mayor &c. of New York*, 3 Hill, 427 ; *Marshall v. Dudley*, 4 J. J. Marsh. 244 ; *Gatewood v. Palmer*, 10 Humph. 466 ; *Hawkins v. Ridenhour*, 13 Mis. 125. Judgments bear the rate of interest established by law, whatever may have been the rate agreed upon by the parties in the contract on which the judgment was founded. *Morgan v. Evans*, 2 Cl. & Fin. 160 (Am. ed.), note (2) ; *Wilson v. Marsh*, 2 Beasley (N. J.), 289 ; *Verree v. Hughes*, 6 Halst. 91 ; *Wernwag v. Brown*, 3 Blackf. 457 ; *Gilbert v. Driver*, 3 Head (Tenn.), 463. By statute in Massachusetts, 1847, c. 153, interest may be collected on an execution from the time of the rendition of judgment.

The same is the law of Maine, and similar provisions exist in other states : as New York, Pennsylvania, South Carolina, Kentucky, &c. See *Sayre v. Austin*, 3 Wend. 496 ; *Berryhill v. Wells*, 5 Binney, 56, 59 ; *Kirk v. Richbourg*, 2 Hill (S. Car.), 352 ; *Chamberlain v. Maitland*, 5 B. Mon. 448, 449 ; *Martin v. Kilburne*, 11 Vt. 93. But at common law interest could not be levied on an execution on a judgment. See *Watson v. Fuller*, 6 John. 283 ; *Mason v. Sudan*, 2 John. Ch. 172, 180.]

(*k*) *Foster v. Weston*, 6 Bing. 709 ; *Higgins v. Sargent*, 2 B. & C. 348.

(*l*) *Anon.* 4 Taunt. 30.

(*m*) *Anon.* Ib. 722.

(*n*) *Chalie v. Duke of York*, 6 Esp. 45 ; *Bain v. Case*, Moo. & M. 262 ; S. C. 3 C. & P. 496. When equity will not allow interest on a balance in the hands of an attorney ; *Wright v. Southwood*, 1 Y. & J. 531.

(*o*) Per Lord Denman, *Edwards v. Vere*, 5 B. & Ad. 282, 285.

(*p*) *Page v. Newman*, 9 B. & C. 378 ; *Foster v. Weston*, 6 Bing. 709.

(*q*) *Ex parte Williams*, 1 Rose, Bank. Ca. 399 ; *Cameron v. Smith*, 2 B. & Ald. 305 ; *Maberley v. Robins*, 5 Taunt. 626 ; In the matter of *Burgess*, 8 Ib. 660. To entitle a party to interest on a bill or note, from maturity, it must be produced at the trial. *Hutton v. Ward*, 15 Q. B. 26.

(*r*) Bayl. on Bills, 5th ed. 348 ; [*Jacob v. Adams*, 1 Dallas, 52 ; *Powell v. Guy*, 5

mand, the plaintiff is entitled to recover interest from the time of making a demand; (*s*) or, if there has not been a demand, then from the time of the service of the writ of summons in an action on the note. (*t*) So a note in the following form: "I promise, for myself and executors, to pay F. H., or her executors, one year after my death, 300*l.*, with legal interest," — bears interest from the date thereof. (*u*) So, it appears that a banker's check carries interest. (*v*) And so the drawer or indorser of a bill, or the indorser of a note, is liable to pay interest from the time he receives notice of dishonor. (*x*)

And where a bill of exchange — which is not, on the face of it, made payable with interest — is drawn in one country and payable in another, the drawer is liable, on the bill being dishonored, to pay as damages, interest according to the current rate in the country where the bill was drawn. (*y*)

Interest is likewise payable on an account stated for money lent. (*z*)

So, if there be a contract to pay a debt by bill of exchange or promissory note, and the debtor refuse to give it, the plaintiff may recover interest on the amount, from the time when the bill or note, if given, would have become due. (*a*)

Foreign bill.

Account stated for money lent.

On bill contracted to be given in payment of goods.

Dev. & Bat. 70; Rollman *v.* Baker, 5 Humph. 406; Francis *v.* Castlewain, 4 Bibb, 282; Pollard *v.* Yoder, 2 Marsh. (Ky.) 264.] Interest runs from the date of a bill or note payable at a future time "with interest;" Kennerley *v.* Nash, 1 Stark. 452; Hopper *v.* Richmond, *Ib.* 507; Denman *v.* Dibden, R. & M. 380; Richards *v.* Richards, 2 B. & Ad. 447. And in such a case the interest is part of the *debt*; Hudson *v.* Fawcett, 7 M. & G. 348.

(*s*) Per Cur. Blaney *v.* Hendricks, 2 Bl. 761.

(*t*) Pierce *v.* Fothergill, 2 Scott, 334; [Dodge *v.* Perkins, 9 Pick. 369; Hunt *v.* Nevers, 15 Pick. 500; Brewer *v.* Tyringham, 12 Pick. 547; Haven *v.* Foster, 9 Pick. 112; Bryfogle *v.* Beckley, 16 Serg. & R. 264; Nelson *v.* Cartwel, 6 Dana, 7; Wells *v.* Abernethy, 5 Conn. 228; Etheridge *v.* Binney, 9 Pick. 272, 279; Schmidt *v.* Limehouse, 2 Bailey, 276; Walker *v.*

Wills, 6 Ark. 167. Where a note was in these words, "Due A. B. *on demand*, 300 dollars," &c., it was held, that interest would commence from the time of demand only. Cannon *v.* Beggs, 1 McCord, 370; Vaughan *v.* Goode, 1 Minor, 417.]

(*u*) Roffey *v.* Greenwell, 10 A. & E. 222.

(*v*) Anon. 1 Jur. 844.

(*x*) Walker *v.* Barnes, 5 Taunt. 240.

(*y*) Gibbs *v.* Fremont, 9 Exch. 25. [See Ayer *v.* Tilden, 15 Gray, 178; Chase *v.* Dow, 47 N. H. 405.]

(*z*) Blaney *v.* Hendricks, 2 Bl. 761.

(*a*) Davis *v.* Smyth, 8 M. & W. 399; Farr *v.* Ward, 3 M. & W. 23; De Bernales *v.* Fuller, 2 Camp. 248, note; Marshall *v.* Poole, 13 East, 98; Slack *v.* Lowell, 3 Taunt. 157; Middleton *v.* Gill, 4 *Ib.* 298; Sutton *v.* Morgan, 5 *Ib.* 758. [Interest is recoverable as of right on contracts in writing, for payment of money at a day, as bills of exchange, &c., or on contracts

But if the delay in paying the bill or note has been occasioned by the default of the holder, or the claim has lain dormant for a long time without any demand by him, the jury may refuse to allow interest. (*b*) And so if, at the time the bill falls due, there be no person legally authorized to receive it, — as if the holder be dead intestate, and administration be not then taken out; in such a case even the acceptor is not chargeable with interest, except from the time when the administrator demands payment of the principal. (*c*)

So money awarded to be paid on a particular day, carries interest from that day, provided it be duly demanded thereon, (*d*) and the plaintiff proceed by action; *aliter* if he proceed by attachment. (*e*)

Money payable under award.

for the payment of interest; or where the money claimed has been used, and upon bonds, &c. But in other cases, it is for the jury to determine under the circumstances of the case. *Newson v. Douglas*, 7 Har. & J. 417. See *Bayley on Bills* (2d Am. ed.) 375-378; *Gully v. Remy*, 1 Blackf. 70; *Horner v. Hunt*, 1 Blackf. 214.]

(*b*) *Cameron v. Smith*, 2 B. & Ald. 308; *Du Belloix v. Lord Waterpark*, 1 D. & R. 16. When not allowed after tender; *Dent v. Dunn*, 3 Camp. 296. [The vendee of land on a credit, to whom a deed is made, and possession given, is not excused from paying interest on the purchase-money, because the payment of the principal had been delayed by the adverse claim and suit of a third party, the vendee during all that time having enjoyed the issues and profits of the land. *Selden v. James*, 6 Rand. 465; *Brockenborough v. Blythe*, 3 Leigh, 619; *Oliver v. Hallam*, 1 Grattan, 298; *Boyce v. Britchett*, 6 Dana, 231; *Cullum v. Bank*, 4 Ala. 22. The covenant of the vendor in *Selden v. James*, was to sell and convey a perfect title (which was done as was proved by the event of the trial), not that there should be no claimants; he has not, therefore, committed a breach of his covenant; in this there is no excuse for the non-payment of interest. *Selden v. James*, 6 Rand. 465. To excuse the vendee of land from paying the interest of the purchase-

money to the vendor, it is not enough that he should be ready and willing to pay the principal; it ought to appear that he kept it useless and unproductive by him, and that he gave the vendee notice of that fact. *Selden v. James*, *supra*. But see *Stevenson v. Maxwell*, 2 Sandf. Ch. 273; *M'Kinnan v. Sterrett*, 6 Wats, 162. Although a defendant is restrained from paying money by attachment, he ought, nevertheless, to pay interest during the time he was so restrained, if he continues to hold and use the money; and there is a contract to pay interest for it, so that interest is part of the debt. *Adams v. Cordis*, 8 Pick. 260. See *Templeman v. Fontleroy*, 3 Rand. 434; *Prescott v. Parker*, 4 Mass. 170. But if, before demand is made, or other default, a debtor is summoned as trustee, and he practices no delay in making his answer, and no collusion with any other party, he is prohibited by law from paying the money; he is in no default, and not chargeable with interest. *Oriental Bank v. Tremont Ins. Co.* 4 Met. 1; *Hubbard v. Charlestown Branch Railroad Co.* 11 Met. 128. See *Sideman v. Lafsley*, 13 Serg. & R. 224.]

(*c*) *Murray v. East India Company*, 5 B. & Ald. 204.

(*d*) *Pinhorn v. Tuckington*, 3 Camp. 468; *Johnson v. Durant*, 4* C. & P. 327.

(*e*) *Churcher v. Stringer*, 2 B. & Ad. 777.

So a bond, conditioned for the payment of money, impliedly carries interest from the time of the obligor's default. (*f*) On bonds; or

And so, a surety who is compelled to pay a sum of money owing to the default of his principal, is entitled to interest on the sum so paid. (*g*) money paid by surety.

But there cannot be a title to compound interest, without a contract expressed, or implied from the mode of dealing with former accounts, or custom. (*h*) And it has been Compound interest.

(*f*) *Farquhar v. Morris*, 7 T. R. 124; *Hogan v. Page*, 1 B. & P. 337. But not to an amount beyond that of the penalty. *Bromley v. Goodere*, 1 Atk. 75. [Interest has, in some cases, been allowed beyond the penalty of the bond, even against a surety. *Harris v. Clap*, 1 Mass. 308; *Pitts v. Tilden*, 2 Mass. 118, and cases in note (*b*); *Warner v. Thurlow*, 15 Mass. 154.]

(*g*) *Petrie v. Duncombe*, 20 L. J. Q. B. 242; [*Isley v. Jewett*, 2 Met. 168; *Gibbs v. Bryant*, 1 Pick. 118.]

(*h*) *Fergusson v. Fyffe*, 8 C. & F. 121, 140; [*Page v. Broom*, 4 Cl. & Fin. (Am. ed.) 437, note (1). An agreement for interest upon interest that has already become due, is not usurious; nor is the taking of compound interest usurious; if it be voluntarily paid by the debtor, it cannot be recovered back. *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487; *Tylee v. Yates*, 3 Barbour, 222; *Fitzhugh v. M'Pherson*, 3 Gill, 408; *Dow v. Drew*, 3 N. H. 40; *Pinckard v. Ponder*, 6 Geo. 253; *Harvey v. Crawford*, 2 Blackf. 43; *Fobes v. Cantfield*, 2 Ham. (Ohio) 18; *Wilcox v. Howland*, 23 Pick. 167; *Niles v. Board of Comm. Sink. Fund*, 8 Blackf. 158; *Otis v. Lindsey*, 1 Fairf. 315; *Kellogg v. Hickok*, 1 Wend. 281; *Childers v. Deane*, 4 Rand. 406. In *Wilcox v. Howland*, 23 Pick. 169, *Shaw C. J.* said: "The result of the doctrines upon this subject seems to be, that a contract to pay compound interest is not usurious or void; that an agreement to pay interest annually or semi-annually is valid, and may be enforced by action; that a claim for interest on such interest is an equitable claim, but

that on an action brought, interest will not be allowed on interest from the time it fell due, because it would savor of usury, and because the holder of the note, by forbearing to call for his interest when it became due, shall be deemed to have waived his right to have interest converted into capital. But if a party will deliberately give a new note on that consideration, we cannot say it is illegal or made without consideration. We can perceive no difference in principle, between the case of such a note and that where the parties have settled an account upon the principle of making annual or semi-annual rests, and thus computing interest on interest, and an express promise to pay the balance. That an action will lie to recover such balance, including the compound interest, the case of *Eaton v. Bell*, 5 B. & Ald. 34, is an authority directly in point." In *Ferry v. Ferry*, 2 Cush. 92, 97, 98, the same learned judge said: "The contract to pay interest at the expiration of each year is a valid contract, and may be enforced by action. *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 Mass. 221; *Herries v. Jamieson*, 5 T. R. 553." So, where partial payments have been made in cash, or by rents and profits, or otherwise, the payments are to be first applied to the satisfaction of the interest then due, and the balance only is to go towards the reduction of the principal. *Dean v. Williams*, 17 Mass. 417; *Fay v. Bradley*, 1 Pick. 167; *Reed v. Reed*, 10 Pick. 398; *Den's Estate*, 35 Cal. 692. This principle gives the creditor the benefit of compound interest, where payments from time to time have been made,

held in the House of Lords that, in general, a contract or promise for compound interest is not available in England, except, perhaps, in the case of mercantile accounts current, for mutual transactions. (*i*) Nor is a customer bound or affected by the practice of his bankers, to charge interest upon interest, by making rests in their accounts at stated intervals, unless it be proved that he was aware that such was their custom, (*k*)

or where after the interest becomes due, he obtains security for it, or resorts to an action to enforce the payment. But where there has been *no payment, demand, or adjustment*, it has been repeatedly settled, that in ascertaining the amount due on a note, made payable with interest annually, simple interest only is to be computed. *Hastings v. Wiswall*, 8 Mass. 455; *Dean v. Williams*, 17 Mass. 417; *Von Hemert v. Porter*, 11 Met. 210. The same rule has been followed in Maine, in a case in which the reasons are very fully stated. *Doe v. Warren*, 7 Greenl. 48. The same rule is adopted in New York, in equity, and, we believe, at law. *Connecticut v. Jackson*, 1 John. Ch. 13; *Van Benschooten v. Lawrence*, 6 John. Ch. 313. See, also, to the same effect, *Pindall v. Bank of Marietta*, 10 Leigh, 481; *Howe v. Bradley*, 19 Maine, 31, 36, 40; *Sparks v. Garrigues*, 1 Binney, 152, 165; *Atwood v. Taylor*, 1 Man. & Gr. 279, 332. But see *Preston v. Walker*, 26 Iowa, 205. It is agreed that a claim to interest upon interest, is so far an equitable one, that a note or other security given for it will be sustained and enforced as on a good and sufficient consideration. In addition to *Wilcox v. Howland*, *supra*, see *Camp v. Bates*, 11 Conn. 488; *Mowry v. Bishop*, 5 Paige, 98, 102; *Fobes v. Cantfield*, 3 Ham. (Ohio) 17. But it is not agreed that interest is not to be charged on interest that has become due and remains unpaid; on the contrary, it has been held in many cases, that where the payment of the principal, or of part of it, has been postponed to a more distant day than the interest, which by agreement is to be paid at certain specified times, as annually or semi-annually before the princi-

pal is due, interest is chargeable on each instalment of interest. *Kennon v. Dickens*, 1 Taylor, 231; *Austin v. Imus*, 23 Vt. 286; *Gibbs v. Chisolm*, 2 Nott & McCord, 38; *Talliaferro v. King*, 9 Dana, 331; *Watkinson v. Root*, 4 Ham. (Ohio) 373; *Singleton v. Lewis*, 2 Hill (S. Car.), 408; *Pierce v. Rowe*, 1 N. H. 179; *Stone v. Bennett*, 8 Missou. 41, 45. See *Farwell v. Sturdivant*, 37 Maine, 308. Agreements for compound interest seem to be discountenanced in chancery, not that they are considered usurious, but because they are "harsh and oppressive," "tend to influence the avarice and harden the heart of the creditor," and "savor of usury." See *Connecticut v. Jackson*, 1 John. Ch. 13, 16, 17; *Quackenbush v. Leonard*, 9 Paige, 334, 345; *Shaw C. J. in Wilcox v. Howland*, 23 Pick. 169; *Ossulston v. Yarmouth*, 2 Salk. 449; *Waring v. Cunliffe*, 1 Ves. jun. 99; *Mowry v. Bishop*, 5 Paige, 98.]

(*i*) *Fergusson v. Fyffe*, 8 C. & F. 121, 140; *Ex parte Beavan*, 9 Ves. 224; and see *Caliot v. Walker*, 2 Anst. 495; *Scholey v. Ramsbottom*, 2 Camp. 486, note; *Bruce v. Hunter*, 3 Camp. 467; *Eaton v. Bell*, 5 B. & Ald. 34; *Sackett v. Bassett*, 4 Madd. 64, note; *Moore v. Voughton*, 1 Stark. 487; *Newal v. Jones*, Moo. & M. 449; S. C. 4 C. & P. 124; [*Mowry v. Bishop*, 5 Paige, 98; *Fobes v. Cantfield*, 3 Ham. (Ohio) 18; *Childers v. Deane*, 4 Rand. 406.]

(*k*) *Moore v. Voughton*, 1 Stark. 487; [*Cabot v. Walker*, 2 Anst. 496; *Eaton v. Bell*, 5 B. & Ald. 34; *Bainbridge v. Wilcox*, 1 Bald. 536. Although it is a legal usage of merchants to cast interest on the items of their mutual accounts, and

In all other cases, however, interest is allowed, if there be a *contract* for the payment thereof. (*k*¹) And an agreement between the parties that it should be paid, may be inferred from the course of dealing with them; *e. g.* if it has been frequently charged and paid without objection, in former and similar accounts. (*l*)

By agreement, or course of dealing.

So if it appear to be the invariable custom or usage in any particular trade or business, to charge interest, this may amount to evidence of a contract, to allow it between parties having transactions therein. (*m*)

Usage of trade.

So where a party is indebted to a trader who becomes bankrupt, in a sum bearing interest, the assignees or trustee may recover interest accruing subsequently to the bankruptcy, although there be no express reservation of interest. (*n*)

By trustee or assignees of bankrupt.

strike a balance at the end of a year, and make that balance the first item of principal for the ensuing years; *Stoughton v. Lynch*, 2 John. Ch. 210, 214; *Barclay v. Kennedy*, 2 Wash. C. C. 350; yet neither the usage nor the law allows this to be done, except under a specific agreement, after the mutual dealings of the parties have ceased. *Von Hemert v. Porter*, 11 Met. 210; *Wood v. Smith*, 23 Vt. 706; *Denniston v. Imbrie*, 3 Wash. C. C. 396, 402.]

(*k*¹) [Where there is a stipulation for interest, it may be recovered even after the principal debt has been paid; but it is otherwise, where the interest is recoverable merely as damages, or as incident to the debt. *Fake v. Eddy*, 15 Wend. 76; *Gillespie v. The Mayor &c. of New York*, 3 Edwards, 512, 514; *Stone v. Bennett*, 8 Missou. 41, 43; *Abbott v. Wilmot*, 22 Vt. 437; *Milliken v. Southgate*, 26 Maine, 424; *Henry v. Flagg*, 13 Met. 64; *Compart v. Ewing*, 8 Blackf. 328. See *Stevens v. Barringer*, 13 Wend. 539; *Tillotson v. Preston*, 3 John. 229; *Stearns v. Brown*, 1 Pick. 530; *Howe v. Bradley*, 19 Maine, 31, 36, 39; *Pinckney v. Singleton*, 2 Hill (S. Car.), 343. If the interest is payable annually or semi-annually, an action will lie for each instalment of interest as it falls due, although the note is not yet due.

Greenleaf v. Kellogg, 2 Mass. 568; *Cooley v. Rose*, 3 Mass. 221; *Herries v. Jamieson*, 5 T. R. 553. But after the principal has become due, no suit can be sustained for any unpaid instalment of interest; they all become merged in the principal, and can be recovered by suit only with the principal. *Howe v. Bradley*, 19 Maine, 31. And no interest will be allowed upon the accrued instalments of interest. *Hastings v. Wiswall*, 8 Mass. 455; *Ferry v. Ferry*, 2 Cush. 92; *Doe v. Warren*, 7 Greenl. 48.]

(*l*) *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Denton v. Rodie*, Ib. 496; *Gwyn v. Godby*, 4 Taunt. 346; *Eaton v. Bell*, 5 B. & Ald. 34.

(*m*) Ib. See *Ikin v. Bradley*, 2 Moore, 206; [*Liotard v. Graves*, 3 Caines, 226, 234, 245; *Williams v. Craig*, 1 Dallas, 313, 315; *Koone v. Miller*, 3 Watts & S. 271; *Meech v. Smith*, 7 Wend. 305, 313. As to the effect of custom and usage in reference to the allowance of interest, see further, *Reab v. M'Allister*, 8 Wend. 109; *Wood v. Hickok*, 2 Wend. 501; *Reid v. Rens. Glass Factory*, 3 Cowen, 436; *Barclay v. Kennedy*, 3 Wash. C. C. 350; *Denniston v. Imbrie*, 4 Wash. C. C. 396; *Stoughton v. Lynch*, 2 John. Ch. 214.]

(*n*) *Pott v. Beavan*, 7 M. & G. 604; *S. C.* 1 C. & K. 335; [*Bainbridge v. Wil-*

And where there is a contract to pay a sum of money, with interest, on a certain day, the jury may give interest, as damages, for the detention of the debt beyond that day. (*o*)

When interest recoverable as damages at common law.

When recoverable under 3 & 4 Will. 4, c. 42, s. 28.

Now, however, by the act for the amendment of the law, (*p*) it is enacted, "that upon all *debts*, or *sums certain*, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, *if they shall think fit*, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be

cocks, 1 Bald. 536. As to the rule for computing interest when partial payments have been made, see *Connecticut v. Jackson*, 1 John. Ch. 17, 18; *Stoughton v. Lynch*, 2 John. Ch. 209; *Dean v. Williams*, 17 Mass. 417; *Scanland v. Houston*, 5 Yerger, 310; *Harvey v. Crawford*, 2 Blackf. 43; *Fay v. Bradley*, 1 Pick. 194; *Riney v. Hill*, 14 Mis. 500; *Leonard v. Wildes*, 36 Maine, 265. By the law of what place the amount of interest is determined, see *Bayley on Bills* (2d Am. ed.) 79, 82, 378; *Bailey v. Seal*, 1 Harring. 232; *Hosford v. Nikols*, 1 Paige, 225. Interest is to be paid according to the law of the place where contracts are to be performed. *Story Conf. Laws* (2d ed.), §§ 291, 292, and numerous cases cited in notes. See *Von Hemert v. Porter*, 11 Met. 210; *Burton v. Anderson*, 1 Texas, 93; *Arrington v. Gee*, 5 Ired. 590, 595; *Winthrop v. Carleton*, 12 Mass. 4, 6; *Ralph v. Brown*, 3 Watts & S. 395, 401; *Fanning v. Consequa*, 17 John. 351; *Boyce v. Edwards*, 4 Peters, 112, 123; *Pecks v. Mayo*, 14 Vt. 33; *Pomeroy v. Ainsworth*, 22 Barb. 118.]

(*o*) *Atkinson v. Jones*, 2 A. & El. 439; *Price v. Great Western Railway Company*, 16 M. & W. 244; *Morgan v. Jones*, 8 Exch. 620; 1 Wms. Saund. 201, note (*u*). [Where a money rent is reserved in a lease of land, payable on a certain day, and is not paid, it carries interest as matter of right. *Dennison v. Lee*, 5 Gill & J. 383; *Clark v. Barlow*, 4 John. 183; *Oberberger*

v. Nicholls, 6 Binney, 159, 162; *Buck v. Fisher*, 4 Wheat. 516; *Honore v. Murray*, 3 Dana, 31; *Elkin v. Moore*, 6 B. Mon. 462; *Burnham v. Best*, 10 B. Mon. 227; *Lush v. Druse*, 4 Wend. 313, 317. But in Virginia it is held that interest is not due on rent as a matter of law; *Cooke v. Wise*, and *Newton v. Wilson*, 3 Hen. & Munf. 483; but it may be given by the jury. *Dow v. Adam*, 5 Munf. 21, 23; *Mickie v. Wood*, 6 Rand. 571.]

(*p*) 3 & 4 Will. 4, c. 42, s. 28. The 29th section enables a jury "to give damages in the nature of interest, over and above the value of the goods at the time of the conversion and seizure, *in trover*, or *trespass de bonis asportatis*; and in actions on policies of assurance, made after the act was passed" (*i. e.* after the 14th August, 1833). The 30th section gives interest on writs of error, from the time execution was delayed, in any personal action. As to the time from which interest on a writ of error will be allowed, see *Garland v. Carlisle*, 5 C. & F. 355; *Levi v. Langridge*, 4 M. & W. 337; *Burn v. Carvalho*, 1 A. & E. 895; *Ibbotson v. Fenton*, 1 Jur. 397. Even before the stat. 3 & 4 Will. 4, c. 42, s. 30, interest was allowed in proceedings in error in the exchequer chamber, in all cases where it would have been recoverable in the court below. Per Lord Tenterden, *Page v. Newman*, 9 B. & C. 378, 381. As, for example, on the affirmance of a judgment on a promise to execute a mortgage, *Anon.* 4 Taunt. 876.

payable by virtue of some *written instrument at a certain time*; or, *if payable otherwise*, then from the time when *demand* of payment shall have been made *in writing*, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand until the term of payment: *provided that interest shall be payable in all cases in which it is now payable by law.*"

And upon this enactment it may be observed: *First*, that it does not extend to any action on contract, which is brought strictly for the recovery of *unliquidated damages*; (*q*) *Secondly*, that it is *discretionary* in the *jury* to allow interest even in the cases specified; *Thirdly*, that the jury have no discretionary power to award interest, unless there be proof of a *written instrument*, whereby the debt or sum certain is made *payable at a certain time*; (*r*) or of a *written demand* of the money, containing a *notice* that interest will thenceforth be claimed; (*s*) and, *Fourthly*, that the jury *must* give interest in all those cases in which it was payable *by law* at the time the act was passed.

And by the act to repeal the laws relating to usury — 17 & 18 Vict. c. 90, s. 3, — it is enacted: that where interest is ^{17 & 18 Vict.} now payable upon any contract, express or implied, for ^{c. 90, s. 3.} payment of the legal or current rate of interest; or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if that act had not been passed.

5. Account stated.

The form of the common count upon an account stated is: that the plaintiff sues the defendant "for money payable by the defendant to the plaintiff, for money found to be due ^{Form of the count.} from the defendant to the plaintiff, on accounts stated between them." (*t*)

1. It is not necessary, in order to support this count, to show the

(*q*) In an action for money had and received, brought against a railway company to recover over-charges made by them on the carriage of goods, interest may be given under the statute, as upon a *sum certain*, if there have been a previous demand thereof. *Edwards v. Great Western Railway Company*, 21 L. J. C. P. 72, 89.

(*r*) *Taylor v. Holt*, 3 H. & C. 452.

(*s*) See per Cur. *Harper v. Williams*, 4 Q. B. 219, 234. And see, as to the con-

tents of this notice, *Mowatt v. Lord Londesborough*, 3 E. & B. 307, 336; S. C. (in error), 4 E. & B. 1, 12. The following form may be adopted: "Mr. A. B., — I do hereby demand of you the payment of the debt, amounting to , now due from you to me; and take notice that I claim interest on the said debt, from this day until the said debt shall be paid. Dated this day of . (Signed) C. D."

(*t*) See 15 & 16 Vict. c. 76, sched. B.

nature of the original debt, or to prove the specific items constituting the account. (*t*¹) But it must appear that, at the time of the accounting, certain claims existed, of and concerning which an account was stated; (*u*) that a balance was then struck and agreed upon; (*v*) and that the defendant expressly admitted that a certain sum was then due from him as a debt. (*x*)

Hence it follows, that an account cannot be stated with reference to a debt payable on a contingency. (*y*)

But it is said that where there are cross demands, it is not necessary that the items should consist of debts due *in præsentia*, or that they should be *legal* debts; but that equitable claims may also be brought into the account. (*z*)

Where, however, the account is stated with reference to only one item, that item must consist of a debt then due and owing. (*a*)

Nor is it essential that there should be cross or reciprocal demands between the parties, or that the defendant's acknowledgment, that a certain sum was due from him to the plaintiff, should relate to more than a single debt or transaction. (*b*) And, therefore, an admission by the defendant,

(*t*¹) [The stating of an account is in the nature of a new promise. *Holmes v. D'Camp*, 1 John. 34. The defendant gave to the plaintiff a memorandum of items of account, to which was subjoined a promise to pay the plaintiff or order the amount specified, being for the value of a protested bill, and added, that it was to be paid out of the proceeds of certain provisions and lumber; the writing was held good evidence in support of a count on an *insimul computassent*. *Montgomery v. Ives*, 17 John. 38. The plaintiff and defendant being mutually indebted, drew up a schedule of their respective demands, and on the same paper executed a sealed instrument with a penalty, setting forth that the schedule was a statement of all claims, and when the account should be balanced, the securities which each held should be given up and balanced. In an *insimul computassent* brought for a balance due the plaintiff, held, that the specialty was no contract for the payment of money, and did not merge the simple promise, but

might be construed as an admission of subsisting demands. *Hoyt v. Wilkinson*, 10 Pick. 31.]

(*u*) Per Blackburn J. *Laycock v. Pickles*, 4 B. & S. 497, 501.

(*v*) *Trueman v. Hurst*, 1 T. R. 42, note; *Prouting v. Hammond*, 8 Taunt. 688.

(*x*) *Lane v. Hill*, 18 Q. B. 252; 21 L. J. Q. B. 318; *Ashby v. Ashby*, 3 M. & P. 186; and see *Barker v. Birt*, 10 M. & W. 61.

(*y*) See *Baker v. Heard*, 5 Exch. 959, 966.

(*z*) Per Blackburn J. *Laycock v. Pickles*, 4 B. & S. 497, 506.

(*a*) *Lemere v. Elliott*, 6 H. & N. 656; per Parke and Alderson BB. *Gough v. Findon*, 7 Exch. 48, 50, 51; *Lubbock v. Tribe*, 3 M. & W. 607; *Tucker v. Barrow*, 7 B. & C. 623, 624; *Whitehead v. Howard*, 5 Moore, 105; *Green v. Davies*, 4 B. & C. 235, 242.

(*b*) *Highmore v. Primrose*, 5 M. & S. 65.

that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated. (*c*)

Evidence of an accounting with the agent of the plaintiff, or with his wife, (*d*) is sufficient to support this count. But evidence of an acknowledgment of a debt, in a conversation with a stranger, is not sufficient. (*e*) So it appears doubtful, whether evidence of an accounting with the agent of an unknown principal, would support a count on an account stated with the principal. (*f*) And a count by husband and wife, on an account stated, must show that the accounting was concerning matters in which the wife had an interest. (*g*)

It must likewise appear that the accounting took place before action brought. (*h*)

With whom
to be stated.

At what
time.

2. The production by the plaintiff of an I O U, is *prima facie* evidence that an account has been stated by the defendant with him, although no name is mentioned in the instrument. (*i*) And where the plaintiff lent money to A., on the promise of B. to become surety for its repayment; and, after the money was advanced, A. and B. signed and delivered to the plaintiff the following memorandum: "We jointly and severally owe you 60*l*." this was held to be evidence of an account stated by A. and B. jointly. (*k*)

Nature of
evidence re-
quired to
support.

So, an entry in a bankrupt's examination, of a certain sum being due to A., is evidence of an account stated between them. (*l*)

So, a bill of exchange or promissory note is evidence of an account stated, as between the immediate parties thereto. (*m*) And where it appeared that in August, 1844, the defendant gave a promissory

(*c*) Knowles *v.* Michel, 13 East, 294; 3 A. & E. 331, 332; Allen *v.* Cook, 2 Pinchon *v.* Chilcott, 3 C. & P. 236. See Dowl. 546.

(*i*) Fesenmeyer *v.* Adcock, 16 M. & W. 449, 450; Curtis *v.* Richards, 1 Scott N. R. 155.

(*k*) Buck *v.* Hurst, L. R. 1 C. P. 297.

(*l*) Eicke *v.* Nokes, 1 Moo. & Rob. 358.

(*m*) Burmester *v.* Hogarth, 11 M. & W. 97, 101, 102; and see Fryer *v.* Roe, 12 C. B. 437; Wheatley *v.* Williams, 1 M. & W. 533, 541.

(*d*) Bull. N. P. 129.

(*e*) Breckon *v.* Smith, 1 A. & E. 488.

(*f*) Baynham *v.* Holt, 8 Jur. C. P. 963.

(*g*) Johnson *v.* Lucas, 1 E. & B. 659.

(*h*) Per Littledale J. Spencer *v.* Parry,

note to the plaintiff for 23*l.* 2*s.* 6*d.*, which the note described as being the amount of interest due on a promissory note for 117*l.* 4*s.*, dated 6th July, 1838, up to 6th July, 1844: this was held to be evidence for the jury of an account stated in August, 1844, of a then subsisting debt of 117*l.* 4*s.* (*n*)

So, a promise by the drawer of an over-due bill, to pay an indorsee and holder the amount thereof, is evidence of an account stated between these parties. (*o*) But in such a case the plaintiff must show, that the defendant admitted that the amount acknowledged to be in arrear was actually due to him, the plaintiff; or he must show an admission by the defendant, that he was liable for the specified amount to the legal holder of the bill, and prove that he, the plaintiff, is the holder thereof. (*p*)

And an award is not evidence of an account stated, as between the parties to the submission. (*q*)

If the plaintiff prove an accounting with the defendant, but it appear that the debt, which was the subject thereof, was not due from the defendant in his own right, nor to the plaintiff in his own right, the count on an account stated will fail. (*r*) And so, on the other hand, if the plaintiff declare upon an account stated with him in a *representative* character, for instance, as executor, it must appear that the defendant admitted that the debt was due to the plaintiff *in that character*. Thus, in *Green v. Davies*, (*s*) the plaintiff sued as executrix, on an instrument in the following form: "Received of Mr. B." (the testator) "100*l.*, which I promise to pay on demand, with interest." The instrument itself could not be read in evidence, owing to its not being properly stamped; but it was proved that the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following Sunday: and it was held that, although this was an admission that something was due, still, — as it did not appear what the nature of the debt was, or whether it was due to the plaintiff as executrix, or in her own right, — the plaintiff was not entitled to recover.

So, in *Tucker v. Barrow*, (*t*) the plaintiffs sued as assignees,

(*n*) *Perry v. Slade*, 8 Q. B. 115.

(*q*) *Bates v. Townley*, 2 Exch. 152.

(*o*) *Oliver v. Dovatt*, 2 Moo. & Rob. 230.

(*r*) *Petch v. Lyon*, 9 Q. B. 147.

(*s*) 4 B. & C. 235. See *Ashby v. Ash-*

(*p*) *Jardine v. Payne*, 1 B. & Ad. 663. by, 3 M. & P. 186.

See *Singleton v. Barrett*, 2 C. & J. 368.

(*t*) 7 B. & C. 623.

upon an account stated with them in that capacity. They proved that the defendant was examined before the commissioners, and admitted that he had, after the act of bankruptcy, received money from the bankrupt; and it was held, that as there was no admission of a subsisting debt *payable to the assignees* — but merely that, at a certain time, a sum had been received, — the action was not maintainable upon the account stated.

It is further necessary, in order to support this count, to show, not only that the defendant admitted a debt, but also that, expressly or by reference, he acknowledged that some certain amount of money was due from him. (u) Thus, a letter written and sent by the defendant to the plaintiff in these words: "I must request you to oblige me by holding my check till Monday, and, in the interim, I will send you the amount in cash;" was held, by the majority of the judges of the court of queen's bench, not to be evidence of an account stated, so as to entitle the plaintiff even to nominal damages. (x)

Defendant must admit a certain amount to be due.

But where, in an action for *goods sold*, it appeared that the defendant had said he owed the debt, and that the plaintiff had applied to him to pay it, and that he would do so as soon as he could, but did not mention any sum; and the plaintiff could not prove the amount due; Abbott C. J. held that, on this evidence, the plaintiff was entitled to a verdict for nominal damages. (y)

So a mere conjecture expressed by one party to another, as to a certain sum being due to the latter, affords no proof of an account stated, unless it be adopted by the latter. (z)

Nor will this count be supported by proving a mere offer by the defendant, to pay a sum of money to the plaintiff, unaccompanied by any admission that there was a debt due to the latter. (a)

So the plaintiff cannot recover upon a count on an account stated, merely by showing that the defendant, in answer to a demand of a specific sum, said that he would have paid it *if the plaintiff had not done certain acts*, or the like. The acknowledgment must be unqualified. (b) Thus, where the

Acknowledgment must be unqualified.

(u) Per Parke B. *Hughes v. Thorpe*, 5 M. & W. 656, 667; *Bernasconi v. Anderson*, Moo. & M. 183. See *Kennedy v. Withers*, 3 B. & Ad. 767.

See *Dickenson v. Hatfield*, 5 C. & P. 46.

(x) *Lane v. Hill*, 18 Q. B. 252; 21 L. J. Q. B. 318; *Erle J. diss.*

(z) *Hughes v. Thorpe*, 5 M. & W. 656.

(a) *Wayman v. Hilliard*, 7 Bing. 101.

(y) *Dixon v. Beveridge*, 2 C. & P. 109.

(b) *Calvert v. Baker*, 4 M. & W. 417; *Evans v. Verity*, R. & M. 239. It is for the court to decide whether a conversa-

indorsee of a bill of exchange stated to his immediate indorser, before it became due, that, in the event of the bill being dishonored, he would send and take it up; this was held not to be sufficient to support a count on an account stated. (*c*)

But where, on a settlement of accounts between the plaintiff and the defendant, a balance was struck, which the defendant agreed was correct, adding, however, that when he had done certain things, there would not be much, if anything, between them; it was held, that this was good evidence of an account stated. (*d*) And so, where the defendant, on being shown the plaintiff's account by the clerk of the latter, objected to one item, but made no remark as to the others, and promised to send corn for the balance; this was held to be sufficient evidence of an account stated. (*e*)

Where moneys were due from a *feme sole*, and she married, and her husband stated an account with the creditor, and promised to pay the balance; it was held that he could not be sued alone on his account and promise, — there being no new consideration to fix him separately, and the mere account not altering the nature of the original debt for this purpose. (*f*) And it would seem that — as a husband who has married since the passing of the 33 & 34 Vict. c. 93, cannot be sued for a debt due from his wife *dum sola* (*g*) — he would not now be liable at all, on an account stated by him with reference to such debt.

But there are some cases in which the settlement of an account and the admitting a balance to be due will, to a certain extent, afford a new cause of action, and confer a legal right which did not before exist in regard to the original debt. Thus, though, in general, one partner cannot sue his copartner at law for his share of the profits; (*g*¹) yet if a final account be stated, and one partner admit that there is a balance due from him, he may be sued at law by his copartner for the amount. (*g*²)

tion amounts to an account stated. Bishop
v. Chambre, 3 C. & P. 55.

(*c*) *Burgh v. Legge*, 5 M. & W. 418.

(*d*) *Rigby v. Jeffrys*, 7 Dowl. 561.

(*e*) *Chisman v. Count*, 2 M. & G. 307;
2 Scott N. R. 567.

(*f*) *Drue v. Thorne, Aleyn*, 72; recognized in *Mitchinson v. Hewson*, 7 T. R.
438. See *Morris v. Norfolk*, 1 Taunt. 212.

(*g*) Sect. 12.

(*g*¹) [*Collyer Partn.* 264 *et seq.*; nor the executor or administrator of his partner. *Ozeas v. Johnson*, 4 Dall. 534; S. C. 1 Binn. 191; *Andrews v. Allen*, 9 Serg. & R. 241.]

(*g*²) [*Foster v. Allanson*, 2 T. R. 479
Wray v. Milestone, 5 M. & W. 21.]

Debt due
from wife
dum sola.

Party may
recover on an
account
stated, where
he could not
on the original
debt.

So, where A. was indebted to B. ; and C. afterwards entered into partnership with B. ; and A. then contracted a further debt with both, and settled an account with both, as well upon what was due to B. before his partnership with C., as upon the debt subsequently contracted ; it was held, that B. & C. might join in an action on an account stated. (*h*)

So, if money be due in equity, and the trustee state an account concerning it with the *cestui que trust*, it may be recovered in this action. (*i*)

There are likewise cases in which a party may succeed on the count on an account stated, although the original debt might not have been recoverable, from the want of legal evidence to support it. Thus, where there was an agreement between the plaintiff and the defendant, that if the plaintiff, who was tenant of a farm, would surrender her tenancy to her landlord, and would prevail on the latter to accept the defendant as his tenant in place of the plaintiff, he, the defendant, would pay the plaintiff 100*l.*, as soon as he should become tenant of the farm ; and there was evidence that, after the defendant had, through the plaintiff's application to the landlord, succeeded to the possession of the farm, he admitted that he owed the plaintiff 100*l.* ; this was held to be sufficient to enable the plaintiff to recover on the account stated ; although he could not recover on the original contract, inasmuch as it had not been executed according to the provisions of the statute of frauds. (*k*) And so, where the defendant agreed with the plaintiff, by parol, that if she would take a lease of certain premises belonging to him, he would pay her 20*l.* towards putting them in repair ; and — the lease having been afterwards executed and accepted by the plaintiff — she took possession of and repaired the premises ; and the plaintiff, when she paid the first quarter's rent, demanded the sum of 20*l.* from the defendant, who said he would pay it when the next quarter's rent became due ; it was held that the acknowledgment of that sum being due, entitled the plaintiff to recover upon the account stated ; although it was objected that parol evidence, as to the terms on which the lease was to be granted, was inadmissible by the statute of frauds. (*l*)

(*h*) *Moore v. Hill*, Peake Add. Ca. 10. See, also, *Smith v. Forty*, 4 C. & P. 126.

(*i*) Per Crompton J. *Howard v. Brownhill*, 23 L. J. Q. B. 23, 24.

(*k*) *Cocking v. Ward*, 1 C. B. 858, 868.

(*l*) *Seago v. Deane*, 4 Bing. 459 ; and see *Pinchon v. Chilcott*, 3 C. & P. 236 ; *Knowles v. Michel*, 13 East, 249 ; *Peacock v. Harris*, 10 East, 104.

And, in like manner, it has been held, that if a party admit a sum of money to be due from him, this is evidence to support the account stated, although it appears that the debt arose out of a written agreement which is not produced. (*m*)

So where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the defendant's hand of this date;" and the memorandum was inadmissible for want of a promissory note stamp; it was held, that the account stated might be proved by other evidence than the memorandum. And it was also held, that verbal evidence might be received to show an admission that the money was due, and a promise to pay it by instalments; though such admission and promise were made at the time of signing the memorandum, and were embodied in it. (*n*)

But where it can be shown that the original debt is absolutely void, from any illegal or immoral consideration, — or where it is made void by any statute, as by those against gaming, — then such evidence is not admissible to prove an account stated. (*o*) And so it has been held, that if, in an action on an attorney's bill, the plaintiff fails on the count for work and labor, because no bill has been delivered; he cannot recover on the count on an account stated, although he prove that the charges were assented to by his client. (*p*)

So, in cases within the statute of frauds, the plaintiff will not be entitled to recover on the account stated, if it be shown that the account was stated at a time when the case stood wholly upon the original contract. (*q*)

And where a sum of money is secured by deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, an action on an account stated will not lie; even although the obligor admits the correctness of the account, and promises to pay such balance. (*r*)

(*m*) *Arthur v. Dartch*, 8 Jur. 118; *Newhall v. Holt*, 6 M. & W. 662.

(*n*) *Singleton v. Barrett*, 2 C. & J. 368. The note itself would not be admissible in such a case. *Hedley v. Bainbridge*, 3 Q. B. 316; *Green v. Davies*, 4 B. & C. 235. An I O U given for the amount of a note, which was afterwards altered in a material particular, is admissible to prove an ac-

count stated. *Gould v. Coombes*, 1 C. B. 543.

(*o*) *Cocking v. Ward*, 1 C. B. 858, 870.

(*p*) *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, Ib. 858.

(*q*) *Earl of Falmouth v. Thomas*, 1 C. & M. 89, 110.

(*r*) *Middleditch v. Ellis*, 2 Exch. 623.

3. There are also cases in which the stating of an account may amount to an admission of the *title* of the party with whom the account is stated, to receive the money. Thus, where the defendant agreed verbally with the plaintiff to take a house and purchase the fixtures, at a valuation to be made by two brokers; and an inventory of the furniture and fixtures was accordingly made, which was described generally as "An inventory of the fixtures," &c., with the gross amount placed at the foot thereof; it was held that the defendant, having taken possession of the furniture and fixtures, and paid part of the amount of the valuation, was liable for the remainder, as on an account stated, and could not object that the plaintiff's title to the house was defective. (s)

Cases in which the stating of an account admits the plaintiff's title.

So a collector or renter of turnpike tolls, though irregularly appointed, may recover, upon an account stated, the amount of tolls for which he has credited the defendant, on his passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the fact of the plaintiff having sent to the defendant an account of the tolls due; and of the latter having, not long after, inclosed 5*l.* in a letter to the plaintiff, in which he stated that he should have *the remainder* next week, was held to be evidence of an account stated, and a recognition of the plaintiff's title to be accounted with for the tolls. (t)

4. The statement of an account, however, is not *conclusive*, but only presumptive evidence against the party admitting the balance to be against him; (u) there being, as has been said, no rule of law which precludes a man from disputing, accounting for, or explaining, any particular item of such an account. (x) But it has been held at nisi prius that, where an account for goods sold is settled, and the vendee gives a bill of exchange for the amount, but which bill is not paid, he cannot, on an action being brought thereon, go into evidence to impeach the charges in the first account which has been settled; (y)

Statement of an account is only presumptive evidence.

(s) *Salmon v. Watson*, 4 Moore, 73.

(t) *Peacock v. Harris*, 10 East, 104.

(u) See *Trueman v. Hurst*, 1 T. R. 42.

(x) Per Tindal C. J. *Rose v. Savory*, 2 Scott, 199, 203; *Thomas v. Hawkes*, 8 M. & W. 140; *Wilson v. Wilson*, 14 C. B. 616. [See 1 Story Eq. § 523 *et seq.*; *Barger v. Collins*, 7 Harr. & J. 213; Har-

den v. Gordon, 2 Mason, 541, 561; *Perkins v. Hart*, 11 Wheat. 237, 256; 1 Dan. Ch. Pr. (4th Am. ed.) 371.] See, in general, on the right of a party to explain or qualify an admission, *Baildon v. Walton*, 1 Exch. 617.

(y) *Knox v. Whalley*, 1 Esp. 159.

and that where parties having cross demands, settle and balance their accounts, — notwithstanding part of the plaintiff's demand could not have been recovered by action, — the settlement of the accounts binds the defendant, so that he cannot set up that defence when sued for the balance. (z)

(z) *Dawson v. Remnant*, 6 Esp. 24 ; and see *Laycock v. Pickles*, 4 B. & S. 497 ; *Spurraway v. Rogers*, 12 Mod. 517.

CHAPTER IV.

OF ILLEGAL CONTRACTS.

1. In general.
2. Contracts illegal at common law.
3. Contracts rendered illegal by statute.
4. Contracts as affected by mistake or fraud.

SECTION I.

Illegal Contracts in General.

WHENEVER the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court, either of law or equity, will lend its assistance to give it effect. (a)

Effect of,
illegality in
general.

(a) Per Parke B. *Cope v. Rowlands*, 2 M. & W. 149, 157; per Giffard L. J. *Re Cork & Youghal Railway Co.* L. R. 4 Ch. Ap. 748, 762; *Gaslight Co. v. Turner*, 7 Scott, 779, 793; *Wetherell v. Jones*, 3 B. & Ad. 221, 225 See, also, *Fivaz v. Nicholls*, 2 C. B. 501; [Parker C. J. in *Wheeler v. Russell*, 17 Mass. 281; *Belden v. Pitkin*, 2 Caines, 149; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. De Grand*, 15 Mass. 39. See, also, *Buck v. Albee*, 26 Vt. (3 Deane) 184; *Barton v. Port Jackson & Union Falls Plank Road Co.* 17 Barb. 397; *Scott v. Duffy*, 14 Penn. St. 18; *Callaghan v. Hallett*, 1 Caines, 104; *Forsythe v. State*, 6 Ohio, 21; *Sampson v. Shaw*, 101 Mass. 145. No right can be derived from any agreement made in express opposition to the laws of the place where it is made. *Hall v. Mullin*, 5 Harr. & J. 193. No action can be sustained in the courts of a state on an agreement entered into in violation of the laws of the United States, or of the laws of the particular state where it is sought to be enforced. *Maylin v. Conlon*, 4 Dall. 298; *Biddis v. James*, 6 Binney, 321; *Seidenbender v. Charles*, 4 Serg. & R. 159. See further, *Duncannon v. M'Clure*, 4 Dall. 308; *Newbold v. Sims*, 2 Serg. & R. 317; *Graves v. Delaplaine*, 14 John. 146; *Sturges v. Bush*, 5 Day, 542; *Condon v. Walker*, 1 Yeates, 483; *Briggs v. Tillotson*, 8 John. 304; *Sylvester v. Girard*, 4 Rawle, 185; *Kennett v. Chambers*, 14 How. (U. S.) 38. So every new agreement, entered into for the purpose of carrying into execution any of the unexecuted provisions of a previous illegal contract, is void. *Barton v. Port Jackson & Union Falls Plank Road Co.* 17 Barb. 397. "Where the illegality of the contract arises from any moral turpitude, the court will not undertake to ascertain the relative guilt of the parties, or afford re-

For, although, in general, the agreements into which parties enter have the force of laws over those parties, — because *Modus et conventio vincunt legem*; (b) yet this rule does not apply where the interests of the public, or of morality, are affected by the agreement, and may be injured by the observance of its provisions.

Nor will a foreign contract be enforced in this country, if it be
 Foreign con- against the law of this country, even although it may be
 tract. valid by the law of the country where it was made. (c)

And the test, as to whether a demand connected with an illegal
 Test of transaction be capable of being enforced is, whether the
 illegality. plaintiff requires to rely on such transaction in order to establish his case. (d) Where, therefore, to an action on a covenant to pay money, the defendant pleaded: that there had been an illegal agreement that, for a price to be paid to the plaintiff, land should be sold and conveyed to the defendant for an illegal object; that the land was conveyed to the defendant for that object; and that afterwards — a part of the purchase-money remaining unpaid — the defendant, to secure payment thereof to the plaintiff, made the covenant in the declaration mentioned; it was held that, — although the plea did not allege that the covenant was given in pursuance of the illegal agreement, — still, as the law would not enforce the original illegal contract, so neither would it allow the parties to enforce the covenant for payment of the purchase-money which, by the original bargain, was tainted with illegality. (e)

lief to either.” Wilde J. in *White v. Franklin Bank*, 22 Pick. 186.] The common law prohibits everything which is *contra bonos mores*. See *Allen v. Rescous*, 2 Lev. 174; *Fletcher v. Harcot*, Hutton, 56; *Holman v. Johnson*, Cowp. 343.

(b) See, also, Code Civil, book 3, tit. 3, ch. 3, s. 1.

(c) *Grell v. Levy*, 16 C. B. N. S. 73; *Hope v. Hope*, 26 L. J. C. 417; and see *Santos v. Illidge*, 6 C. B. N. S. 841, 862; and per *Blackburn J. S. C.* (in *Cam. Scac.*) 8 Ib. 861, 874. [See *Adams v. Gay*, 19 Vt. 358.]

(d) See *Fivaz v. Nicholls*, 2 C. B. 501, 512, 513; *Taylor v. Chester*, L. R. 4 Q. B. 309; *Simpson v. Bloss*, 7 Taunt. 246; and see *Feret v. Hill*, 15 C. B. 207. In that case A. procured B. to grant to him a lease of premises, by a false representation as to the purpose for which they were to be

used; and A. took possession thereunder, and converted them into a brothel; whereupon B. forcibly expelled him; and it was held that A. might maintain ejectment against B. because *the term had vested in A. and therefore he was not calling on the court, in that action, to aid him in enforcing an illegal agreement.* [Where A. placed a quantity of spirituous liquors in the hands of B. to sell, and B. sold it in violation of the license law of Vermont 1846, and A. sued B. for the money he received in payment, it was held that A. could not recover, because the contract in the case was so connected with the illegal sale of the liquors, that A. would have to prove the arrangement and the illegal sale to sustain his action. *Buck v. Albee*, 26 Vt. 184.]

(e) *Fisher v. Bridges* (in *Cam. Scac.*), 3 E. & B. 642; reversing the judgment of

If, however, there be in the same deed certain covenants which are against law, and others which are not, the deed, although void as to the former, is good as to the rest. And the law is the same as to bonds where the condition is, in part, against law. But if the whole condition be against law, the bond is void. (*f*)

Deed or bond may be good as to part, and void as to the rest.

So, if a contract be made on several considerations, one of which is illegal, the whole contract is void, and that whether the illegality be at common law, or by statute. (*g*)

If one of several considerations illegal, whole contract void.

But where the *consideration* is tainted by no illegality, and some of the *promises* only are illegal, the illegality of these does not communicate itself to, or taint the others, except when, owing to some peculiarity in the contract, its parts are inseparable. (*h*)

Aliter as to one of several promises.

the Q. B. in S. C. 2 E. & B. 118; and see *Geere v. Mare*, 2 H. & C. 339; *Clay v. Ray*, 17 C. B. N. S. 188.

(*f*) Bro. Ab. Faits, 318, pl. 37.

(*g*) *Waite v. Jones*, 1 Scott, 730; *Shackell v. Rosier*, 3 Scott, 59; *Featherstone v. Hutchinson*, Cro. El. 199; [*Deering v. Chapman*, 22 Maine, 488; *Ladd v. Dillingham*, 34 Maine, 316; *Coburn v. Odell*, 30 N. H. 540; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Woods*, 28 N. H. 290; *Barton v. Port Jackson & Union Falls Plank Road Co.* 17 Barb. 397; *Rose v. Truax*, 21 Barb. 361. If any part of the entire consideration of a contract is illegal, as against sound morals or public policy, the whole is void. *Donallen v. Lenox*, 6 Dana, 91; *Woodruff v. Heniman*, 11 Vt. 592; *Hinesbury v. Sumner*, 9 Vt. 23; *Armstrong v. Toler*, 11 Wheat. 258; *Crawford v. Morrell*, 8 John. 253; *Toler v. Armstrong*, 4 Wash. C. C. 297; *Carleton v. Whitcher*, 5 N. H. 196; *Hinde v. Chamberlain*, 6 N. H. 225.]

(*h*) Per *Tindal C. J.* *Shackell v. Rosier*, 3 Scott, 59; *M'Allen v. Churchill*, 11 Moore, 483; [*Leavitt v. Blatchford*, 5 Barb. 9; *Leavitt v. Palmer*, 3 Comst. 19; *Hook v. Gray*, 6 Barb. 398; *Carleton v. Woods*, 28 N. H. 290; *Tracy v. Talmage*, 4 Kernan (N. Y.), 162; *Curtis v. Leavitt*,

1 Smith (N. Y.), 9. In *Carleton v. Woods*, *supra*, it appeared that A. agreed to sell to B. his stock of goods and groceries. The price to be paid was the cost and freight of the articles. In order to ascertain the cost a schedule of the articles was made, and the cost of each article was separately carried out. For the sum total of the prices, which was divided into several parts, B. gave several promissory notes. Among the articles was a quantity of spirituous liquors sold contrary to law, the price of which formed a part of the consideration of the notes. The declaration contained a count on each of the promissory notes, and also a count for goods sold and delivered. *Woods J.* said: "The counts upon the notes are not sustained. The consideration of the notes was in part illegal." "But the case in relation to the count for goods sold and delivered stands differently. The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract each article was to be separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was in effect a contract to pay for each article a price to

And the distinction between contracts to do acts which are *mala prohibita*, and such as are *mala in se*, is now quite repudiated. (i)

No distinction between *mala prohibita* and *mala in se*.

Illegality may be established by parol evidence.

And there is this peculiarity with regard to illegal contracts,—that although, in general, parol evidence cannot be given as between the parties to a written instrument, in order to contradict or add to its provisions, yet it may be given in order to show that the instrument is void on the ground of fraud or illegality, however formal

be determined in manner before stated. The consideration for the promise to pay for the goods is not to be regarded as one and indivisible." "The contract for the goods sold in this case, then, not being entire but divisible, and the prices of the several articles being agreed by the parties and readily ascertainable, we are of opinion that the plaintiff is well entitled to recover, under the count for goods sold and delivered, the agreed price of the goods sold, excepting the spirituous liquors." See *Walker v. Lovell*, 28 N. H. 138; *Comstock J. in Curtis v. Leavitt*, 1 Smith (N. Y.), 96. In *Robinson v. Green*, 3 Met. 159, it appeared that an auctioneer sold, severally, numerous lots of standing wood, at the request of the owner, and part of the wood was within the limits of a county where the auctioneer had no authority, and was by law prohibited to sell; it was held that the sale of each lot was a distinct contract, and the auctioneer's commission accrued upon each complete sale, and that he was entitled to recover of the owner compensation for selling those lots which were within the county where he was licensed and qualified to sell at auction. Shaw C. J. said: "If there were an express promise to pay him" [the auctioneer] "a fixed sum, as a compensation for the entire sale, it would have presented a different question. Where an entire promise is made on one entire consideration, and part of that consideration is illegal, it may avoid the entire contract." See *Rand v. Mather*, 11 Cush. 1.]

(i) *Aubert v. Maze*, 2 B. & P. 374, 375;

Bensley v. Bignold, 5 B. & Ald. 341; *Collins v. Blantern*, 2 Wils. 351. [In *White v. Bass*, 3 Cush. 449, 450, Shaw C. J. said: "We take it to be now settled by the authorities, that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect, an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect; and, in this respect, the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms, or by affixing a penalty to it, is unlawful; and it will not promote, in one form, that which it declares wrong in another." See *Greenough v. Balch*, 7 Greenl. 462; No. 44 Amer. Jurist, 249, 250; *Utica Ins. Co. v. Kip*, 8 Cowen, 20. So far as regards the effect of a statute upon a matter prohibited under a penalty, there is no distinction between *mala prohibita* and *mala in se*. *Lewis v. Welch*, 14 N. H. 294. But there is a distinction between statutes which impose a penalty for the purpose of prohibiting a contract, and those where the penalty is imposed for some other purpose than that of making the contract illegal. *Lewis v. Welch*, *supra*; *Favor v. Philbrick*, 7 N. H. 340. See, also, the remarks of Wilde J. in *White v. Franklin Bank*, 22 Pick. 184; and in *Lowell v. Boston & Lowell R. R. Corp.* 23 Pick. 32; *Schermerhorn v. Talman*, 4 Kernan (N. Y.), 93, 124, 125.]

and regular such instrument itself may appear to be, (*k*) and whether it be by parol or under seal. (*l*)

This principle was ably expounded by Wilmot C. J. in *Collins v. Blantern*. (*m*) A bond, in the usual form, for payment of money, was alleged to have been given as an indemnity for a note entered into by the obligee for compounding a prosecution for perjury. In support of the bond it was contended, that no averment should be admitted of its being given upon an illegal consideration, not appearing on the face of it. The court, however, decided against the bond; and in the course of his judgment the chief justice said: "The manner of the transaction was to gild and conceal the truth; and whenever courts of law see such attempts made to conceal wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is a contract to tempt a man to transgress the law; to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void is for the public good; you shall not stipulate for iniquity. All writers upon our law agree in this; no polluted hand shall touch the pure fountain of justice."

And as the benefit of the public, and not the advantage of the defendant, is the principle upon which a contract is allowed to be impeached on account of illegality; so this objection may be taken by either of the parties to such contract. (*m*¹) "The objection," says Lord Mansfield, (*n*) "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the

It may be taken advantage of by one of the parties to the contract.

(*k*) *Wright v. Crookes*, 1 Scott N. R. 685, 698; *Abbott v. Hendricks*, 1 M. & G. 791; 2 Scott N. R. 183.

(*l*) *Gaslight Co. v. Turner*, 7 Scott, 779, 794.

(*m*) 2 Wils. 347.

(*m*¹) [Persons may avoid illegal contracts entered into by them, though in so doing they are obliged to allege their own illegal conduct. *Bailey v. Taber*, 5 Mass. 296; *Wheeler v. Russell*, 17 Mass. 258; *Farrar v. Burton*, 5 Mass. 395. As, where a statute providing that notes of a certain description, made or issued after a particular day, should be void, also attached a penalty to the issuing or passing of them; it was held, that the maker of such notes,

purporting to be dated before that day, might avoid the payment of them even in the hands of innocent holders, by proving that they have false dates, and that they were in fact made or issued after the day. *Bailey v. Taber*, *supra*. See *Warren v. Manuf. Co.* 13 Pick. 518, 521; *Favor v. Philbrick*, 7 N. H. 326; *Roby v. West*, 4 N. H. 285; *Buck v. Albee*, 26 Vt. 184.]

(*n*) *Holman v. Johnson*, Cowp. 341, 343; and see per Lord Loughborough, *Parsons v. Thompson*, 1 H. Bl. 322; [*Foster v. Thompson*, 11 Cush. 322, 323; per Parsons C. J. in *Greenwood v. Curtis*, 6 Mass. 380; *Hoover v. Pierce*, 26 Miss. (4 Cush.) 627.]

defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; . . . not for the sake of the defendant, but because the court will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." (o)

So where parties to a contract against public policy, or illegal, are not *in pari delicto*; but public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, — a court of equity will grant such relief. (p) But equitable

Relief in equity where parties not *in pari delicto*.
(o) And see *Taylor v. Chester*, L. R. 4 Q. B. 309. [The law in such cases leaves the parties where it finds them. See *Roll v. Raguet*, 4 Ohio, 400; *S. C. 7 Ib.* 76; *Moore v. Adams*, 8 Ib. 372; *Dixon v. Olmstead*, 9 Vt. 310; *Foote v. Emerson*, 10 Vt. 338; *Rowan v. Adams*, 1 Sm. & M. 45; *Buck v. Albee*, 26 Vt. 184. The doctrines of Lord Mansfield, stated in the text, have been maintained with great clearness and force in several late Massachusetts cases; in *Myers v. Meinrath*, 101 Mass. 367, where Wells J. says: "In such cases, the defence of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff;" in *Horton v. Buffinton*, 105 Mass. 400, where it is remarked by Ames J. that "the policy of the law is to leave the parties in all such cases without remedy against each other;" and in *Sampson v. Shaw*, 101 Mass. 149, 150. Where a party has sold and delivered goods under a contract of sale void for illegality, he can neither recover the price agreed to be paid, nor reclaim the goods from the purchaser. This disability on the part of the seller to reclaim the goods will avail the purchaser holding them as a sufficient title. Ames J. in *Horton v. Buffinton*, 101 Mass. 400; *Myers v. Meinrath*, 101 Mass. 366; *King v. Green*, 6 Allen, 139.]

(p) Per Bruce L. J. *Reynell v. Sprye*,

21 L. J. C. 633, 651; [*S. C. 1 De G., M. & G.* 660, 678.] And relief may be obtained in equity against a bargain which, although it be not illegal, is hard and unconscionable. *Miller v. Cook*, L. R. 10 Eq. 641. [So relief has been afforded in some cases of this character at law. In *White v. Franklin Bank*, 22 Pick. 186, *Wilde J.* said: "Where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times." "Where the parties are not in *pari delicto*, the rule *potior est conditio defendentis* is not applicable." In this case it was decided, that, although an agreement between a depositor and a bank upon a deposit of money in the bank, that the money should remain for a certain length of time was illegal and void, under Revised Stat. of Massachusetts, c. 36, § 57, as being a contract by the bank for the payment of money at a future day certain, and no action could be maintained by the depositor against the bank upon such express contract, yet he might recover back the money deposited in an action commenced before the expiration of the time for which it was to remain in deposit, the parties not

terms may be imposed on a plaintiff who seeks to set aside an illegal contract, as the price of the relief he asks. (*q*)

It is also a maxim in courts of equity, that wherever persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence, is possessed by the other; and such confidence is abused, or influence exerted, to get an advantage at the expense of the confiding party; a contract obtained by such means will not be permitted to stand; although it could not have been impeached if such confidential relation had not existed. (*r*)

Rule in equity where parties stand in fiduciary relation.

The *presumption* of law, however, is in favor of the legality of a contract; and therefore, if it be reasonably susceptible of two meanings, — one legal and the other not, — that interpretation shall be put upon it which will support and give it operation. (*s*)

Presumption of law is in favor of the legality of a contract.

being *in pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained without a previous demand. So, in *Lowell v. Boston & Lowell R. R. Co.* 23 Pick. 32, Wilde J. said: "In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." See *Sampson v. Shaw*, 101 Mass. 150. So in *Tracy v. Talmage*, 4 Kernan (N. Y.), 162, and in *Curtis v. Leavitt*, 1 Smith (N. Y.), 9, it was held, that where a contract otherwise unobjectionable, is prohibited by a statute, which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and, upon disaffirming the contract, may recover, as upon an implied assumption, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract. See *Schermerhorn v. Talman*, 4 Kernan (N. Y.), 93, 124; *Walan v. Kerby*, 99 Mass. 1. The case of *Prescott v. Norris*, 32 N. H. 101, maintains that the pur-

chaser of spirituous liquors sold without a license, in violation of a statute inflicting a penalty on the seller, may sustain an action on the case for a deceit and false warranty in the sale, if, at the time when he bought, he had no notice that the sale was made without license. And in the opinion of the court, delivered by Perley C. J. it is suggested, that it was by no means clear that the purchaser, even if he had known that the seller had no license, would be held to have shared in the offence in a way to prevent his recovering in the action. The seller and buyer of intoxicating liquor, sold in violation of law, are not *in pari delicto*, because the latter is guilty of no offence. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction, of which he offers evidence, is wholly on the part of the defendant, and he himself is not *particeps criminis*. *Foster J. in Walan v. Kerby*, 99 Mass. 2.]

(*q*) Per Gifford L. J. *Re Cork & Youghal Railway Company*, L. R. 4 Ch. Ap. 748, 762.

(*r*) Per Lord Chelmsford C. *Tate v. Williamson*, L. R. 2 Ch. Ap. 55, 61; and see per Wood V. C. S. C. L. Rep. 1 Eq. 528, 536. Per Gifford L. J. *Guest v. Smythe*, L. R. 5 Ch. Ap. 551, 556.

(*s*) *Mittelholzer v. Fullarton*, 6 Q. B.

So illegality of consideration shall not be inferred; but it is for the party who takes the objection to prove it clearly, even although he should be thereby compelled to prove a negative. Therefore, where a plaintiff declared that the defendant, who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain or other person employed in the navigation; it was held that it lay upon him to prove this averment; for it was not to be presumed that the defendant had been guilty of an omission, which would amount to a criminal neglect of duty. (*t*) So, in an action against a carrier for the loss of goods, delivered to him at Dublin, to be conveyed to Liverpool, it was objected for the defendant, that unless the goods were proved to have been duly entered at the custom-house, the importation would be illegal, and the contract with the carrier void; but it was held that the defendant could not raise this objection, without proving the non-entry of the goods. (*u*)

So, although it would be a good defence to an action for not supplying manuscript to complete a work according to agreement, that the subject-matter of the intended publication was illegal; yet, if the work be not produced, the presumption shall be that the publication was lawful. (*x*)

And in *Ingram v. Wyatt*, (*y*) the Lord Chancellor Brougham said: that "in cases of wills impeached on the ground of *fraud*, it was incumbent on the parties who sought to establish the will, to remove or to explain, and so to neutralize the facts out of which that suspicion arose. It was different where contracts or instruments between parties were alleged to have been fraudulently executed. There it was for the party impeaching the instrument, to show that he had good grounds for supporting the accusation which he brought forward. In the one case, the burden of proof rested on the parties who sought to establish the will; in the other case, they who assailed the instrument were obliged to prove the existence of the facts by which they alleged it was vitiated."

989; S. C. (in error) *Ib.* 1022; per Lord M. & S. 561; *Gale v. Leckie*, 2 Stark. Abinger, *Lewis v. Davison*, 4 M. & W. 107; *Bennett v. Clough*, 1 B. & Ald. 461, 654, 657. 463.

(*t*) *Williams v. East India Company*, 3 East, 192. See per Lord Ellenborough, *Re x v. The Inhabitants of Haslingfield*, 2

(*u*) *Sissons v. Dixon*, 5 B. & C. 758.

(*x*) *Gale v. Leckie*, 2 Stark. 107.

(*y*) *Chancery*, Feb. 11, 1832, MS.

SECTION II.

Contracts Illegal at Common Law.

1. Immoral.
2. Contrary to public policy.

1. Immoral Contracts.

An agreement in consideration of *future* illicit cohabitation between the parties is void; (z) and even *past cohabitation* ^{Cohabitation.} does not form an adequate consideration for a promise not under seal. (a) Nor does it make any difference that such a promise is made in consideration of *past seduction*, as well as of past cohabitation; (b) although an opinion was at one time entertained, that this circumstance would render the promise valid. (c)

So a court of equity will not *enforce* performance of a verbal promise by a single man, that he would settle an annuity on a married woman, with whom he had cohabited whilst she was separated from her husband. (d)

But where the declaration stated that, before and at the time of making the defendant's promise, the plaintiff had cohabited with the defendant; and that certain differences had arisen between them; whereupon the defendant agreed that, in case he and the plaintiff should separate, he would allow her 30*l.* per annum, during her life, by quarterly payments, provided, from and after such separation, she should continue single, and did not cohabit with one D. G., or any one else; the court held that the agreement was good. (e)

And so, where the reputed father of an illegitimate child promised to pay the mother an annuity, if she would maintain the child and keep their connection secret; it was held, that the maintenance

(z) Walker v. Perkins, 3 Burr. 1568; S. C. 1 Bl. 517; Rex v. Inhabitants of Northwingfield, 1 B. Ad. & 912.; [Winebrinner v. Weisiger, 3 Monroe, 55; Travinger v. M'Burney, 5 Cowen, 253; Cusack v. White, 2 Const. Ct. R. 284, 285.]

(a) Beaumont v. Reeve, 8 Q. B. 483.

(b) *Ib.*

(c) See Binnington v. Wallis, 4 B. & Ald. 650, 652.

(d) 1 Madd. 558. A., for many years a common prostitute, was kept by B. for

some time, and then married C. B. continued his visits to her, and gave her a note for 1,000*l.* payable on demand. B. died, and, on a bill filed in chancery by his administratrix, the note was set aside, it being given *ex turpi causâ*, not as *præmium pudicitiae*. Robinson v. Cox, 9 Mod. 263.

(e) Gibson v. Dickie, 3 M. & S. 463. But the reasons given for this ruling, as contained in the above report of the judgment, are not very satisfactory.

of the child was a sufficient consideration to support the assumption. (*f*)

Although, however, past cohabitation or seduction is not such a consideration as will support a simple contract; still it will not render void a bond or other specialty founded thereon. (*g*)

And it would seem that a bond given on such a consideration is valid, even although the obligor do not, after it is given, cease to cohabit with the obligee. (*h*) But in *Friend v. Harrison*, (*i*) — which was an action on an annuity bond for 50*l.* a year, — it appeared that the plaintiff was a common prostitute when the defendant first became acquainted with her; that, after they had cohabited for two years, he gave her the bond; that she still continued to cohabit with him for some weeks, when she went to her friends; and that afterwards they renewed the connection; and Best C. J. said, that the bond, if merely given for past cohabitation, was good; but that, if the plaintiff obtained it from the defendant, intending at the same time to continue the connection, it was void.

So an action is not maintainable to recover the rent of lodgings, knowingly let for the purpose of prostitution. (*k*) And although

(*f*) *Jennings v. Brown*, 9 M. & W. 496. See, also, *Hicks v. Gregory*, 8 C. B. 378; *Smith v. Roche*, 6 C. B. N. S. 223.

(*g*) See *Binnington v. Wallis*, 4 B. & Al. 650; *Nye v. Moseley*, 6 B. & C. 133; *Knye v. Moore*, 1 S. & S. 61; S. C. 2 Ib. 260. See *Turner v. Vaughan*, 2 Wils. 339; *Priest v. Parrott*, 2 Ves. 160; and *Belt's Supplement*, 313; *Marchioness of Annandale v. Harris*, 1 Bro. P. C. 250; S. C. 2 Wms. 432; *Cray v. Rook*, For. 153.

(*h*) *Hall v. Palmer*, 3 Hare, 532. [See *Shenk v. Mingle*, 13 Serg. & R. 29; *Cusack v. White*, 2 Const. Ct. Rep. 285. But such promise would be void, if it appeared to have been made on the sole consideration of stopping a prosecution for fornication and bastardy. Ib. In an action on a promise, in consideration of past seduction, to give a bond for a certain sum, the plaintiff may recover the whole amount of the proposed bond, and cannot afterward maintain another action for the money for which the bond was to be given. Ib.]

(*i*) 2 C. & P. 584.

(*k*) *Girardy v. Richardson*, 1 Esp. 13; *Crisp v. Churchill*, cited 1 B. & P. 340, 341; and see *Smith v. White*, L. Rep. 1 Eq. 626. [See *Dyett v. Pendleton*, 8 Cowen, 737. Where the lessor was in the habit of bringing lewd women under the same roof with the demised premises, though in an apartment not let, by which nocturnal noise and disturbance were made, and, in consequence, the lessee quitted the premises and remained away, with his family; it was held, that this was evidence to go to the jury under a plea of eviction by the landlord, in answer to a declaration for the rent; and that the jury might, upon such evidence, find the plea true; and the lessor would thereby be barred of his rent, the same as on an actual or physical entry and expulsion of the tenant. S. C. Ib. 727, in the court of errors of the State of New York. *Six senators dissenting*. See *Commonwealth v. Harrington*, 3 Pick. 29, 30; *Jenning v. Commonwealth*, 17 Pick. 80.]

the landlord was not apprised, at the time of the letting, of the tenant's mode of life and her object in taking the lodgings; yet if he allowed her to remain after he knew her character, and had become acquainted with the use to which the apartments were put, and after the time when he might legally have evicted her; he shall not recover any rent from her, for the period during which he willingly permitted her to occupy the premises for this purpose. (*l*) But although the tenant be an immodest woman, and the landlord be aware of her character, he may recover his rent, if she receive her visitors elsewhere, and do not use his premises for immoral purposes. (*m*)

Prostitution.

So where, in an action against a woman of the town for board and lodging, it appeared that the plaintiff, the keeper of a house of ill fame, received a portion of the gains of the women in her house, as well as payment for their board and lodging, Lord Kenyon refused to sanction such a demand. (*n*) And where the defendant, a prostitute, was sued by the plaintiffs for the hire of a brougham; and the jury found that the plaintiffs knew her to be a prostitute, and had lent the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men; it was held that they could not recover. (*o*)

But it is no answer to an action for clothes sold to a prostitute, (*p*) or for washing her apparel, (*q*) merely to show that the plaintiff was aware of the defendant's mode of life; or that from the nature of some of the articles, the use to which the defendant would apply them might have been known to the plaintiff.

An action cannot be maintained to recover the price or value of libellous or immoral pictures, sold by the plaintiff to the defendant. (*r*) And in *Poplett v. Stockdale*, (*s*) Best Libels, &c. C. J. held, that the plaintiff, a printer, could not recover any remuneration for printing "The Memoirs of Harriette Wilson," it being a work of a grossly immoral and libellous nature.

(*l*) *Jennings v. Throgmorton*, R. & M. 251.

(*m*) *Appleton v. Campbell*, 2 C. & P. 347.

(*n*) *Howard v. Hodges*, Midd. Sitt. B. R. 2d Dec. 1796; 1 Selw. N. P. 9th ed. 68.

(*o*) *Pearce v. Brooks*, L. Rep. 1 Ex. 212.

(*p*) *Bowry v. Bennett*, 1 Camp. 348. See *Williamson v. Watts*, Ib. 353.

(*q*) *Lloyd v. Johnson*, 1 B. & P. 340.

(*r*) *Fores v. Johnes*, 4 Esp. 97.

(*s*) R. & M. 337.

2. Contracts affecting Public Policy.

An agreement is not void on this ground, unless it manifestly contravene public policy, and be injurious to the interests of the state. (*t*)

General rule.

1. On this principle it is held that any agreement, by bond or otherwise, in general restraint of trade, is illegal and void. (*u*) And, accordingly, where certain mill-owners mutually entered into a bond, whereby they bound

Contracts in general restraint of trade void.

(*t*) See per Best C. J. *Richardson v. Mellish*, 2 Bing. 229, 242; *Roche v. O'Brien*, 1 Ball & B. 338; [*Sedgwick v. Stanton*, 4 Kernan (N. Y.), 289; *Fuller v. Dame*, 18 Pick. 472; *Frost v. Belmont*, 6 Allen, 152; *Gulick v. Ward*, 5 Halst. 87; *Clippenger v. Hepbaugh*, 5 Watts & S. 315. If a contract be void, as against the policy of the law, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344. See *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Piatt v. Oliver*, 1 McLean, 300; S. C. 2 McLean, 277; *Stanton v. Allen*, 5 Denio, 434.]

(*u*) Per Vaughan B. Young *v. Timmins*, 1 Tyr. 226, 241; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Chesman v. Nainby*, 2 Str. 739; S. C. 2 Ld. Raym. 1456; 2 Wms. Saund. 156, n. (1); *Homer v. Ashford*, 3 Bing. 322; *Wickens v. Evans*, 3 Y. & J. 318. [A bond that the obligor shall never carry on, or be concerned in, a particular business, is void. *Alger v. Thatcher*, 19 Pick. 51; *Whitney v. Slayton*, 40 Maine, 224; *Lange v. Werk*, 2 Ohio (N. S.), 519. See, also, *Noble v. Bates*, 7 Cowen, 307; *Pyke v. Thomas*, 4 Bibb, 486; *Jarvis v. Peck*, 1 Hoff. 479; *Vickery v. Welch*, 19 Pick. 528; *Beard v. Dennis*, 6 Ind. 200. *Alger v. Thatcher*, *supra*, was an action on a bond, in which the obligor bound himself never to carry on, or be concerned in, the business of founding iron. Morton J. who delivered the opinion of the court in the case, said: 'Among the most ancient rules of the common law we find it laid down, that

bonds in restraint of trade are void. As early as the second year of Henry 5 (A. D. 1415), we find by the year books that this was considered to be old and settled law. Through a succession of decisions it has been handed down to us unquestioned till the present. It is true the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and without exceptions. Then an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a general and unlimited restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James 1 (A. D. 1621), *Broad v. Jolyffe*, Cro. Jac. 596, when it was holden that a contract not to use a certain trade in a particular place, was an exception to the general rule, and not void. And in the great and leading case on this subject, *Mitchel v. Reynolds*, reported in Lucas, 27, 85, 130, Fortesque, 296, and 1 P. Wms. 181, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision contracts in restraint of trade generally have been held to be void; while those limited as to time, or place, or persons, have been regarded as valid, and

themselves to carry on their works, — in regard to the amount of wages to be paid to the workpeople employed therein, and the times and periods of the engagements of such workpeople, and the hours of work, and the suspending of work, and the general discipline of their works and establishments, — for a period of twelve months from the date of the bond, in conformity with the resolutions of a majority of the said obligors, present at any meeting to be convened as therein mentioned; it was held that this bond was void. (x)

But an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. (y)

When such a contract is valid.

duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer. This doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England the law of apprenticeship and the law against the restraint of trade may have a connection; but we think it very clear that they do not, in any measure, depend upon each other. That the law under consideration has been adopted and practised upon in this country and in this state, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy, and carries out our constitutional prohibition of monopolies and exclusive privileges. The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: 1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make

future acquisitions. And they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void.”]

(x) *Hilton v. Eckersley* (in *Cam. Scac.*), 6 E. & B. 47, 73.

(y) See per *Alderson B. Pilkington v. Scott*, 15 M. & W. 657, 660; [*Mott v. Mott*, 11 Barb. 127; *Whitney v. Slayton*, 40 Maine, 224; *Lange v. Werk*, 2 Ohio (N. S.), 519; *Noble v. Bates*, 7 Cowen, 307; *Bowser v. Bliss*, 7 Blackf. 344; *Van Marter v. Babcock*, 23 Barb. 633. An agreement with a tradesman, to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, cannot be considered as a contract in restraint of trade that would be injurious to the public. *Palmer v. Stebbins*, 3 Pick. 188. Where a tradesman in a city sold a shop,

And from this it appears that the leading principles on this subject are as follow:—

First, In order that an agreement which operates in restraint of trade may be good, such restraint must be partial only. (*y*¹)

Thus, an agreement in restraint of trade will not be held void, merely on the ground of the restriction being indefinite as to duration, provided the same be in other respects a reasonable restriction. (*z*) But where the agreement is limited only as to time, and there is no limit imposed as to space, then it will be void. (*a*)

Again: in order to support a contract in restraint of trade, even if it be under seal, it must appear to have been made on a good consideration. (*b*) And accordingly, if there be no consideration for such a contract, or a consideration of no real value, the contract will be void. (*c*)

But it is now fully settled, that the court cannot look into the adequacy of the consideration, with the view of trying whether the restraint be reasonable or unreasonable; and therefore, all that is necessary is, to see that on the face of the declaration some consideration appears. (*d*)

and in order to induce the purchaser to make the purchase, promised that he would not carry on the same kind of business within certain limits; it was held that the contract was founded on a good and sufficient consideration, and that the restriction as to trade being confined to small limits, was not against the policy of the law. *Pierce v. Woodward*, 6 Pick. 206. A like decision under similar circumstances was made in *Whitney v. Slayton*, 40 Maine, 224. See, also, *Palmer v. Stebbins*, 3 Pick. 188; *Stearns v. Barrett*, 1 Pick. 443; *Perkins v. Lyman*, 9 Mass. 522; *Pierce v. Fuller*, 8 Mass. 223; *Heichew v. Hamilton*, 3 Iowa, 396; *Chappel v. Brockway*, 21 Wend. 158; *Ross v. Sadgebeer*, 21 Wend. 106; *Alcock v. Giberton*, 5 Duer (N. Y.), 76. Such limited restraint is valid if reasonable; and reasonableness must always be shown, for the law presumes such contracts to be void. *Chappel v. Brockway*, *Ross v. Sadgebeer*, *ubi supra*; *Beard v. Dennis*, 6 Ind. 200.]

(*y*¹) [*Talis v. Talis*, 1 El. & Bl. 391; *Pierce v. Woodward*, 6 Pick. 206; *Chappel v. Brockway*, 21 Wend. 158; *Lawrence v. Kidder*, 10 Barb. 641; *Mott v. Mott*, 11 Barb. 127; *Lange v. Werk*, 2 Ohio (N. S.), 519.]

(*z*) *Hitchcock v. Coker* (in error), 6 A. & E. 438, 456; *Elves v. Crofts*, 10 C. B. 241, 258; and see per Parke B. *Hastings v. Whitley*, 2 Exch. 611, 615; *Mallan v. May*, 11 M. & W. 653; *Pemberton v. Vaughan*, 10 Q. B. 87.

(*a*) *Hinde v. Gray*, 1 M. & G. 195; 1 Scott N. R. 123; *Ward v. Byrne*, 5 M. & W. 548, 561. [An agreement not to use certain machines in any of the United States except two, was held good in *Stearns v. Barrett*, 1 Pick. 443.]

(*b*) Per Vaughan B. *Young v. Timmins*, 1 Tyr. 226, 241; *Homer v. Ashford*, 3 Bing. 322, 327; *Hitchcock v. Coker*, 6 A. & E. 438, 456.

(*c*) *Ib.*

(*d*) Per Coltman J. *Sainter v. Fergus-*

And, *lastly*, such an agreement, to be good, must not be unreasonable; that is, the restraint thereby imposed must not be larger than — having regard to the subject-matter of the contract — is required for the necessary protection of the party with whom the contract is made. And where the agreement imposes a restraint larger than this, it is unreasonable and void, — as being injurious to the interests of the public, — on the ground of public policy. (*e*)

And the reasonableness or unreasonableness of the contract is not a matter to be left to the jury, but is a question of law for the court. (*f*)

The following cases will illustrate these principles.

A contract entered into by a practising attorney, for a valuable consideration, that he would relinquish and make over to B. and C., two other attorneys, his business as an attorney, so far as respected his professional practice in London and 150 miles from thence, and all his business as agent for any attorney; and that he would not practise as an attorney within those limits, and would recommend his clients, and would permit B. and C. to use his name in the business, without his interference; has been holden valid. (*g*)

And it has been decided in equity, that an agreement by an attorney and solicitor, not to practise in Great Britain for the space of twenty years, without the consent of a person to whom he had sold his business, was valid. (*h*)

So an agreement not to set up as a surgeon, or man-midwife, in

son, 7 C. B. 716; 18 L. J. C. P. 217, 219; 2 M. & G. 20; 2 Scott N. R. 289; Chesman v. Nainby, 2 Str. 739; S. C. 2 Ld. Raym. 1456; [Kellogg v. Larkin, 3 Chand. (Wis.) 133.]

(*e*) Tallis v. Tallis, 1 E. & B. 391, 410; Mallan v. May, 11 M. & W. 653, 667; per Tindal C. J. Horner v. Graves, 7 Bing. 735, 743; per James V. C. Leather Cloth Co. v. Lhorsont, L. Rep. 9 Eq. 345, 354. [See Lawrence v. Kidder, 10 Barb. 641; Lange v. Werk, 2 Ohio (N. S.), 519; Kellogg v. Larkin, 3 Chand. (Wis.) 133.]

(*f*) Tallis v. Tallis, 1 E. & B. 391, 413; Mallan v. May, 11 M. & W. 653, 668; Davis v. Mason, 5 T. R. 118; Horner v. Graves, 7 Bing. 735; Procter v. Sargent, 2 M. & G. 20; 2 Scott N. R. 289; Chesman v. Nainby, 2 Str. 739; S. C. 2 Ld. Raym. 1456; [Kellogg v. Larkin, 3 Chand. (Wis.) 133.]

(*g*) Bunn v. Guy, 4 East, 190. The assignor of the lease of a public-house in London covenanted not to keep a public-house within the distance of half a mile from the premises assigned. This means half a mile measured by the nearest way of access, between the premises assigned and any public-house afterward kept by the assignor. Leigh v. Hind, 9 B. & C. 774; and see Atkyns v. Kinnier, 4 Exch. 776.

(*h*) Per Lord Langdale M. R. Whittaker v. Howe, 3 Beav. 383.

a certain town, or within twenty miles thereof, is legal. (*i*) So an agreement by the defendant, that he would not, at any time after the determination of a partnership into which he and the plaintiff were about to enter as surgeons, practise as a surgeon at a certain place, or within a distance of two miles and a half therefrom, nor reside within the distance of two miles and a half of the said place, is good. (*k*) And so is a contract between two coachmasters, not to oppose each other, and to charge the same prices; (*l*) or not to run a coach on a particular road; (*m*) or between the manager of a theatre and a dramatic author, that the latter should not write dramatic pieces for any other theatre; (*n*) or by a trader, to sell a secret in his particular trade, and never again to practise it. (*o*)

So an agreement made by a party on entering into the service of a cowkeeper and milkman, that he would not, within a certain time, be concerned, either directly or indirectly, in such business, except for his master, within five miles of N., was held to be valid. (*p*) So, where the assignor of a lease and the good-will of a baker's business agreed that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the premises, without the consent of the assignee; it was held, that such agreement was not void, as an unreasonable restraint of trade. (*q*) And so, an agreement by A.,—in consideration of B. employing him as his assistant at a salary, in the business of a chemist,—not to carry on business as a chemist within three miles of T., was held not to be unreasonable,—although not limited to B.'s lifetime or his continuance in the trade. (*r*)

So a covenant in a lease, by the lessee, to indemnify the overseers of the poor of the parish for the time being, from all charges by reason of the lessee taking a servant or apprentice, who should thereby gain a settlement in, or become chargeable to the parish, is not unlawful, as being in restraint of trade. (*s*)

So an agreement by a publican, upon good consideration, to take beer only from a particular brewery, is valid whilst good and whole-

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| (<i>i</i>) <i>Hayward v. Young</i> , 2 Chit. 407. | (<i>o</i>) <i>Bryson v. Whitehead</i> , 2 S. & S. 74. |
| (<i>k</i>) <i>Atkyns v. Kinnier</i> , 4 Exch. 776; | (<i>p</i>) <i>Proctor v. Sargent</i> , 2 M. & G. 20; 2 |
| and see <i>Dendy v. Henderson</i> , 11 Exch. | <i>Scott N. R.</i> 289. |
| 194; <i>Hayward v. Young</i> , 2 Chit. 407. | (<i>q</i>) <i>Rannie v. Irvine</i> , 7 M. & G. 969. |
| (<i>l</i>) <i>Hearn v. Griffin</i> , 2 Chit. 407. | (<i>r</i>) <i>Hitchcock v. Coker</i> , 6 A. & E. 439; |
| (<i>m</i>) <i>Leighton v. Wales</i> , 3 M. & W. 545. | and see <i>Archer v. Marsh</i> , <i>Ib.</i> 966. |
| (<i>n</i>) <i>Morris v. Coleman</i> , 18 Ves. 437. | (<i>s</i>) <i>Walsh v. Fussell</i> , 6 Bing. 163. |

some beer is supplied; (t) even although there be no agreement by the brewer, to supply the publican with beer. (u) But where the lessee of a public-house covenanted for himself, his executors and assigns, with his lessors, who were brewers, to take all his beer of them, or their successor in their said trade; and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles, and there carried on the business of brewers; it was held that the trade of the lessors was thereby determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer. (x)

It must be borne in mind, moreover, that agreements in restraint of trade, whether under seal or not, are divisible. And, accordingly, it has been held, that where such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, whilst the other is not; the court will give effect to the latter, and will not hold the agreement to be void altogether. (y)

Such agreements are divisible.

Agreements which create, or which tend to create, or secure a monopoly, are likewise illegal, as being contrary to public policy. But there is an exception in the case of patent rights, under the 21 Jac. 1, c. 3. (z)

Monopolies.

2. Contracts prejudicial to and clearly affecting the revenue of this country, cannot be enforced. (a) But a contract merely affecting the revenue or commercial regulations or trade of a foreign country, and not expressly prohibited by our law, appears to be valid. (b)

Agreements affecting the revenue.

(t) *Thornton v. Sherratt*, 8 Taunt. 529; *Holcombe v. Hewson*, 2 Camp. 391; *Jones v. Edney*, 3 Camp. 285; *Cooper v. Twibill*, 3 Ib. 286, n. (x).

(u) *Catt v. Tourle*, L. Rep. 4 Ch. Ap. 654.

(x) *Doe d. Calvert v. Reid*, 10 B. & C. 849.

(y) *Price v. Green*, 16 M. & W. 346; *S. C.* 13 M. & W. 695; *Mallan v. May*, 11 M. & W. 653; *Nicholls v. Stretton*, 10 Q. B. 346; *M'Allen v. Churchill*, 11 Moore, 483; *Chesman v. Nainby*, 2 Str 739.

(z) *Duvergier v. Fellowes*, 10 B. & C. 826.

(a) *Smith v. Mawhood*, 14 M. & W. 452; *Cope v. Rowlands*, 2 M. & W. 157; [*Satterlee v. Jones* 3 Duer (N. Y.), 102.] A contract to sell beer to an unlicensed victualler is bad. *Meux v. Humphreys*, 3 C. & P. 79; *S. C. Moo. & M.* 132.

(b) See per Lord Abinger, *Pellicatt v. Angell*, 2 Cr., M. & R. 311, 313; *Smith v. Marconnay*, Peake Add. Ca. 81. See per Lord Mansfield, *Holman v. Johnson*, Cowp. 343; [*Sortwell v. Hughes*, 1 Curtis, 244; *Territt v. Bartlett*, 21 Vt. 184; *Harris v. Runnells*, 12 How. (U. S.) 79; *Smith v. Godfrey*, 28 N. H. 379; *Merchants Bank of N. Y. v. Spalding*, 5 Selden (N. Y.), 53.]

Restraint of marriage, &c. 3. A contract, the object or effect of which is to restrain or prevent a party from marrying *any person*, is void. (c)

Thus, where the defendant, by deed, entered into the following engagement: "I do hereby promise Mrs. C. L. that I will not marry with any person besides herself; if I do, I agree to pay to the said C. L. 1,000*l.* within three months after I shall marry anybody else;" it was held, that he was not liable to an action for the breach of such undertaking. (d) And in the above case the court observed, that this was not a covenant "to marry the plaintiff," but "not to marry anybody else;" and yet she was under no obligation to marry him; so that it restrained him from marrying *at all*, in case she had chosen not to permit him to marry her.

So where a bond was given by a widow, conditioned to pay the defendant, White, 100*l.* if she should afterwards marry again; and White, at the same time, gave her the like bond, conditioned to pay the like sum to her executors, if she should not marry again before she died; and she married again to Baker; whereupon they brought their bill in chancery to have her bond delivered up; the bond was decreed to be given up to be cancelled, on the ground of its being in general restraint of marriage. (e)

So a wagering contract, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and is therefore void at common law; no circumstances appearing to show that such restraint was prudent and proper in the particular instance. (f)

So a marriage brokerage contract, that is, an undertaking, for reward, to procure a marriage between two parties, is void. (g)

What deeds of separation valid. The court of queen's bench has solemnly decided, (h) that a deed providing for an *immediate* separation between husband and wife, and containing a covenant by

(c) So, a conditional gift in a will, in general restraint of marriage, is void; per *Wigram v. C. Morley v. Rennoldson*, 7 Jur. 938.

(d) *Lowe v. Peers*, 4 Burr. 2225; S. C. affirmed in error, *Wilmot*, 364.

(e) *Baker v. White*, 2 Vern. 215; *Woodhouse v. Shepley*, 2 Atk. 540. See *Cock v. Richards*, 10 Ves. 429.

(f) *Hartley v. Rice*, 10 East, 22. [A sealed bill, promising to pay a sum of money, provided the obligee is not lawfully married within six months from the date, is illegal and void. *Sterling v. Sinickson*, 2 South. 756.]

(g) See *Hall v. Potter*, 3 Lev. 411; *Keat v. Allen*, 2 Vern. 588; *Roberts v. Roberts*, 3 P. Wms. 75, n. (1); *Co. Litt.* 206 b, n. (1); 1 Fonb. Tr. Eq. 5th ed. 263.

(h) *Jee v. Thurlow*, 2 B. & C. 547; and see *Jones v. Waite*, in Dom. Proc. 9 C. & F. 101; S. C. 7 Scott, 317.

the husband with a trustee, to allow his wife an annuity, and a covenant by the trustee to indemnify the husband against his wife's debts, — whether contracted before the separation, or to be contracted after it, (*i*) — is valid and binding. And if a separation deed contain a covenant by the husband, not to compel or endeavor to compel the wife to cohabit with him, a court of equity will restrain him by injunction, from proceeding in a suit for the restitution of conjugal rights. (*k*)

So, if there be an agreement to execute a deed of separation, a court of equity will decree it to be specifically performed. (*l*)

But a deed made in contemplation of an immediate separation, becomes void if such separation does not take place. (*m*) So, a deed providing for a *contingent* or *future* separation of the parties, at the will of either, and not intended to take immediate effect, or which is calculated to prevent a future reconciliation between them, is void. (*n*) So, it would seem that a covenant, before marriage, that in case of any separation taking place between the husband and wife, the husband should make a certain provision for his wife, is void. (*o*) And where a husband and wife, who were separated, entered into an agreement in writing, providing for their living together again, and stipulating that, in the event of a future separation for a particular cause, the wife should receive the income of her own fortune, — which her husband was entitled to receive, — and that her mother should indemnify him against her debts; it was doubted whether such an agreement was valid. (*p*)

Where a deed of separation between husband and wife had been drawn up, but not executed by the husband; it was held, that his executing such deed was a legal consideration for an agreement by

(*i*) See *Summers v. Ball*, 8 M. & W. 596.

(*k*) *Hunt v. Hunt*, 31 L. J. C. 161.

(*l*) *Wilson v. Wilson*, 1 H. L. Cas. 538; 14 Sim. 405; and see *Vansittart v. Vansittart*, 27 L. J. C. 222, 289; *Gibbs v. Harding*, L. R. 5 Ch. Ap. 336. As to the grounds on which a separation deed may be set aside in equity, see *Evans v. Carington*, 30 L. J. C. 364. See, also, *Evans v. Edmonds*, 13 C. B. 777.

(*m*) *Bindley v. Mulloney*, L. Rep. 7 Eq. 343; *Westmeath v. Salisbury*, 5 Bligh N. S. 339.

(*n*) See *Jones v. Waite*, 9 C. & F. 101;

7 Scott, 317; per Lords Eldon and Lyndhurst, *Westmeath v. Salisbury*, 5 Bligh N. S. 339, 366; *Westmeath v. Westmeath*, 1 Jac. 126; in *Dom. Proc.* 1 Dow. & C. 519; *Durant v. Titley*, 7 Price, 577; *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200. When a provision, that the trusts of the deed shall continue, notwithstanding reconciliation, is valid at law, see *Wilson v. Muskett*, 3 B. & Ad. 743; *Randle v. Gould*, 8 E. & B. 457.

(*o*) *Cocksedge v. Cocksedge*, 13 Sim. 244.

(*p*) *Vandergucht v. De Blaquiere*, 5 My. & Cr. 229.

a third person, to pay a sum of money to the husband towards the discharge of certain debts and expenses for which he, the husband, was solely liable. (*q*) So, where A. provided a fund, for defraying the expenses of obtaining an act of parliament to dissolve the marriage of B. and C., who was A.'s illegitimate daughter, this was held not to be an illegal transaction. (*r*)

And an agreement by a man to allow a female, with whom he has cohabited, an annuity for her life, in case they should separate, provided she should continue single, is, as we have seen, a valid agreement. (*s*)

4. Contracts for or respecting the sale or transfer of public appointments — though they may not be prohibited in the particular cases, by the statutes relative to the sale of public offices which we shall hereafter notice (*t*) — may still be void *at common law*, as being contrary to public policy. (*u*)

Thus, where the defendant — in consideration that the plaintiff, who was master joiner in one of his majesty's dockyards, would procure himself to be superannuated — undertook, in case he, the defendant, should succeed the plaintiff as master joiner, to allow him the extra pay from the yard books: it was held that this agreement, having been made without the knowledge of the navy board, to whom the appointment belonged, was void. (*x*) So, a recommendation to an office in the king's household, though of a private

(*q*) *Jones v. Waite* (in Dom. Proc.), 9 C. & F. 101, affirming the judgment of the court of common pleas, *Waite v. Jones*, 1 Scott, 730, and exchequer chamber, *Jones v. Waite*, 7 Scott, 317.

(*r*) *Moore v. Usher*, 7 Sim. 384.

(*s*) *Gibson v. Dickie*, 3 M. & S. 463.

(*t*) See *post*, sect. 3, division 6.

(*u*) See *Richardson v. Mellish*, 2 Bing. 236, 247; [*Gray v. Hook*, 4 Comst. 449; *Grant v. McLester*, 8 Geo. 553; *Duke v. Asbee*, 11 Ired. 112. No action will lie on any contract, bond, or agreement, for the sale of the deputation of the office of clerk of a court. *Harralson v. Dicking*, 2 Car. Law R. 66. Or of any office relating to the administration of justice. *Outon v. Rodes*, 3 Marsh. 433; *Lewis v. Knox*, 2 Bibb, 453. The office of a deputy sheriff or constable cannot be the subject of a sale,

and a contract for such a sale is illegal and void. *Carlton v. Witcher*, 5 N. H. 196; *Meredith v. Ladd*, 2 N. H. 517; *Cardigan v. Page*, 6 N. H. 183. A contract between a sheriff and his deputy, that the latter shall pay the former a certain sum *per annum*, in consideration of his appointment, is not illegal. *De Forest v. Brainard*, 2 Day, 528. The sale of the office of constable, or any other public elective office, is contrary to sound policy, and a note executed for the price is void. *Meredith v. Ladd*, 2 N. H. 517. An action cannot be maintained upon a note, given by a candidate to a person, in consideration of his agreeing to give the candidate his interest at the ensuing election. *Swayze v. Hull*, 3 Halst. 54.]

(*x*) *Parsons v. Thompson*, 1 H. Bl. 322.

nature, and not within the stat. 5 & 6 Edw. 3, does not form a legal consideration for a contract. (*y*) Nor could an action be maintained upon an agreement for the sale, by the owner, of the command of a ship in the East India Company's service, made without the sanction, and in violation of the by-laws of the company. (*z*) So, a court of equity has refused to carry into execution an agreement to assign the fees of a jailer, and the profits of a tap-house connected with the jail. (*a*) So, where a clerk of the peace — appointed by the corporation of a borough under the municipal corporation act, and having fees attached to his office — entered into an agreement with the corporation, to receive a salary and account to them for the fees: it was held by Wood V. C. that this agreement was void on the ground of public policy. (*b*) But a contract for an exchange of the command of East India ships, entered into with the knowledge of the company, was held to be good. (*c*)

5. So, any contract which can prevent or impede the due course of public justice is invalid. (*c*¹)

And the rule on this subject would appear to be, that in all cases of offences which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit; (*d*) but that an agreement for suppressing evidence, or for stifling or compounding a criminal prosecution or proceeding for a *felony*, or for a *misdeemeanor of a public nature*, *e. g.* perjury, or the like, is void. (*e*)

Contracts affecting the course of justice.

(*y*) Harrington *v.* Du Chatel, Bro. C. C. 114.

(*z*) Blachford *v.* Preston, 8 T. R. 89. See observations on this case in Richardson *v.* Mellish, 2 Bing. 229, 247, 250, 251. See Card *v.* Hope, 2 B. & C. 661.

(*a*) Methwold *v.* Walfank, 2 Ves. 238. Agreement to procure an unfit person a commission in the army; Morris *v.* M'Culloch, 2 Eden, 190; S. C. Amb. 432.

(*b*) Corporation of Liverpool *v.* Wright, 28 L. J. C. 868.

(*c*) Richardson *v.* Mellish, 2 Bing. 229. See Waldo *v.* Martin, 4 B. & C. 319.

(*c*¹) [Bills *v.* Comstock, 12 Met. 468.]

(*d*) Per Cur. Keir *v.* Leeman, 6 Q. B. 308, 321; S. C. (in error) 9 Q. B. 371, 395.

(*e*) *Ib.*; Clubb *v.* Hutson, 18 C. B. N. S. 414; Collins *v.* Blantern, 2 Wils. 341, 347; Johnson *v.* Ogilby, 3 P. Wms. 279; Wallace *v.* Hardacre, 1 Camp. 45; Pool *v.* Bousfield, *Ib.* 55; Edgcombe *v.* Rodd, 5 East, 294; Harding *v.* Cooper, 1 Stark. 467; Brett *v.* Close, 16 East, 601. See Drage *v.* Ibberson, 2 Esp. 643; and see *Ex parte* Critchley, 3 D. & L. 527; [Shaw *v.* Reed, 30 Maine, 105; Bowen *v.* Buck, 28 Vt. 308; Mattocks *v.* Owen, 5 Vt. 52;

So, the private rights of an injured party may be made the subject of agreement, in cases where, by the previous conviction of the defendant, the rights of the public have been preserved inviolate. (*f*) Thus, where a defendant — who stood convicted before a court of quarter sessions, of a misdemeanor for ill-treating his parish apprentice, and for which he had been indicted by the parish officers under the statute 32 Geo. 3, c. 57 — agreed, at the suggestion of the court, to pay a sum of money towards the expenses of the prosecution, and gave the prosecutors a promissory note for the amount; it was held that the note was valid; the giving of such security being considered by the court, as part of the punishment suffered by the defendant in expiation of his offence. (*g*) And where, after a conviction before magistrates for a breach of the excise laws, the officer to whom a warrant to levy the penalties was directed, by way of indulgence to the party, took from him a promissory note at two months for the amount, without previous authority from his superiors; it was held, that the note so given was valid. (*h*) So, the substitution of a genuine bill of exchange for a

Curley v. Williams, 1 Bailey, 588; *Hinesburgh v. Sumner*, 9 Vt. 23; *Den v. Moore*, 2 South. 470; *People v. Buckland*, 13 Wend. 592; *Haven v. Hobbs*, 1 Vt. 238; *Robinson v. Cranshaw*, 2 Stew. & Port. 276; *Burley v. Burley*, 6 N. H. 200; *Worcester v. Eaton*, 11 Mass. 368, 376; *Jones v. Rice*, 18 Pick. 440; *Commonwealth v. Pease*, 16 Mass. 91; *Roll v. Raguet*, 4 Ohio, 400; S. C. 7 Ib. 76. An action will not lie on a bond, part of the consideration of which is an agreement not to prosecute for malicious mischief. *Cameron v. M'Farland*, 2 Car. Law, 414. A note given to compound a felony is void at common law, as well in the hands of an innocent indorsee, as in the hands of the payee. *Bell v. Woods*, 1 Bay, 249. A bond given to indemnify an individual against any public prosecution which may be instituted by certain other individuals, for an alleged offense, is illegal; and a promissory note given in consideration of receiving such bond is void. *Hinde v. Chamberlain*, 6 N. H. 225. But a bond given to a person injured by an assault and battery, to make satisfaction and to prevent prosecution, was held to be

legal and valid. *Price v. Summers*, 2 South. 578. See, also, *Plumer v. Smith*, 5 N. H. 553; No. 44 Amer. Jurist, 255-258. If the suppression of evidence in a criminal prosecution constitute any part of the consideration of a contract, such contract is void. *Badger v. Williams*, 1 Chipman, 137. If one escape from another state and be arrested here, in obedience to our statute, as a fugitive from justice, and contract with the party aggrieved for his release, such contract, while executory, is void, as against good policy. *Dixon v. Olmstead*, 9 Vt. 310; *Shaw v. Spooner*, 9 N. H. 197. But to render a contract void, on the ground that the consideration thereof was the stifling a criminal prosecution, it is necessary that the promise should be made for gain, and not merely from motives of kindness and compassion. *Ward v. Allen*, 2 Met. 53.]

(*f*) Per Cur. *Keir v. Leeman*, 9 Q. B. 371, 394.

(*g*) *Beeley v. Wingfield*, 11 East, 46; *Kirk v. Strickwood*, Moo. & M. 275; S. C. 4 B. & Ad. 421. See, also, *Baker v. Townsend*, 7 Taunt. 442.

(*h*) *Sugars v. Brinkworth*, 4 Camp. 46;

forged one, at the instance of the forger, has been held not to be illegal, there being no agreement to prevent a prosecution for the forgery. (*i*) And it seems to be a general rule, that where the offence may be made the subject of an action as well as of an indictment, and civil and criminal proceedings are accordingly taken; an agreement to pay the costs of the action, on its being stopped, is binding, provided the costs of the criminal proceedings be not included in the arrangement, and it be no part of the bargain that the indictment should be abandoned. (*k*)

So, a contract made for the purpose of preventing the erection or continuance of a public nuisance, appears to be good; although part of the consideration be the forbearance to prosecute for the inconvenience already sustained. (*l*)

It has also been said that, in the case of an assault, the injured party may undertake not to prosecute on behalf of the public. (*m*) But even if this be so, it is clear that the same rule will not apply where the assault was coupled with a riot, or with the obstruction of a public officer. (*n*)

So, it appears that an agreement to pay money, in consideration of a party using his interest to procure the pardon of a convict, is not binding. (*o*)

So, an agreement to pay a sum of money to a party, in consideration of his withdrawing a petition which he had presented to the House of Commons, against the return of a member on the ground of bribery, is invalid. (*p*)

So, an agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a sum of money, he would endeavor to postpone the making of a call, or would support the claim of a creditor, is illegal, as being contrary to the policy of the winding-up acts. (*q*)

So an agreement, the consideration for which was that a party should withdraw his opposition to the discharge of an insolvent, was

and see *Pilkington v. Green*, 2 B. & P. 151.

(*i*) *Wallace v. Hardacre*, 1 Camp. 45.

(*k*) *Harding v. Cooper*, 1 Stark. 45; Bayl. on Bills, 5th ed. 509, 510, and n. (41).

(*l*) *Fallowes v. Taylor*, 7 T. R. 475.

(*m*) *Keir v. Leeman*, 9 Q. B. 371, 395; *Elworthy v. Bird*, 2 S. & S. 372.

(*n*) *Keir v. Leeman*, 9 Q. B. 371, 395.

(*o*) *Norman v. Cole*, 3 Esp. 253.

(*p*) *Coppock v. Bower*, 4 M. & W. 361.

(*q*) *Elliott v. Richardson*, L. R. 5 C. P. 744.

held to be void. (*r*) And it made no difference, that such agreement was made with the sanction of the court. (*s*)

So, an agreement between a petitioning creditor and a bankrupt, that the former shall abandon the prosecution of the bankruptcy, and the latter accept a bill for a certain amount, is void. (*t*)

So, a security given by an insolvent debtor to one of his creditors, on the understanding that the claim of the latter should not be inserted in the schedule, was held to be void. (*u*)

So, a contract entered into in consideration of a party refraining to cause a bankrupt to be examined touching his estate, is void. (*v*) And a guaranty given to a creditor, in order to induce him to acknowledge that the debtor owed him nothing, so as thereby to enable the debtor to take the benefit of the 7 & 8 Vict. c. 96, s. 6, — as a trader whose debts amounted, in the whole, to less than 300*l.*, — was held to be void. (*x*)

But a covenant by a friend of the bankrupt, to pay all his creditors their debts in full, in consideration that they will not proceed further under the bankruptcy, is good in law. (*y*)

In *Ex parte Wilson*, (*z*) it was held by Lord Lyndhurst C. to be a contempt, for a petitioning creditor to strike a docket at the instance of a solicitor who undertook to prove the act of bankruptcy, and to guaranty the *petitioning creditor* against any expenses he might be put to by issuing the commission; such guaranty being illegal. But where, at a meeting of the creditors of a bankrupt for the choice of assignees, the creditors all refused to become assign-

(*r*) *Hills v. Mitson*, 8 Exch. 751; *Hall v. Dyson*, 17 Q. B. 785; *Murray v. Reeves*, 8 B. & C. 421. [See *Bruce v. Lee*, 4 John. 411; *Tuxbury v. Miller*, 19 John. 311; *S. P. Goodwin v. Blake*, 9 Mon. 106; *Trumbull v. Tilton*, 21 N. H. 128. A note and subsequent promise to pay a note, given by an insolvent to one of his petitioning creditors, as an inducement to his signing the petition, with a blank for the date to be filled up afterwards, are both void. *Payne v. Eden*, 3 Caines, 213. And this, though the maker of the note had a sufficiency of petitioning creditors to entitle him to his discharge, without the payee. *Payne v. Eden*, 3 Caines, 213. See, also, *Case v. Gerrish*, 15 Pick. 49. A promise

by an insolvent to pay the costs of a previous suit, which has been settled, in consideration of the creditors not opposing his discharge, is void. *Waite v. Harper*, 2 John. 386. See, also, *Wiggin v. Bush*, 12 John. 306; *Yeomans v. Chatterton*, 9 John. 295.]

(*s*) *Humphreys v. Welling*, 1 H. & C. 7.

(*t*) *Davis v. Holding*, 1 M. & W. 159.

(*u*) *Tabram v. Freeman*, 2 C. & M. 451.

(*v*) *Nerot v. Wallace*, 3 T. R. 17.

(*x*) *Coles v. Strick*, 15 Q. B. 2.

(*y*) *Kaye v. Bolton*, 6 T. R. 134; and see *Smith v. Salzmann*, 9 Exch. 535; *Fry v. Malcolm*, 6 Taunt. 117.

(*z*) *Buck*, 306.

ees, and requested A. B., *a stranger to the estate*, to become assignee; and A. B. stated publicly, that he would incur no liability; but consented to become assignee, on the engagement of the solicitor to the *fiat* to indemnify him against the consequences; it was held that this engagement was not illegal. (*a*)

An agreement between *the promoters* of a railway company and a land-owner, that the former should deviate from the line proposed by their bill, and pay the latter a sum of money, in consideration of his withdrawing his opposition to such bill, is valid, — at all events if it do not appear that the parties intended, by so agreeing, to practise a fraud either on some individual, or on the legislature. (*b*) And a similar agreement, made between a land-owner and *a railway company*, — in order to induce the former to withdraw his opposition to a bill which was being promoted by the company, au-

(*a*) *Gilmour v. King*, 1 C. & M. 612.

(*b*) *Simpson v. Lord Howden*, 9 C. & F. 61; 10 A. & E. 793; and see *Shrewsbury & Birmingham Railway Co. v. London & North Western Railway Co.* 17 Q. B. 652; 21 L. J. Q. B. 89; *Vauxhall Bridge Co. v. Earl Spencer*, 2 Madd. 356; S. C. (on appeal) Jac. 64; *Edwards v. Grand Junction Railway Co.* 1 My. & Cr. 650; [*Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331; S. C. 1 De G., M. & G. 735, 754; *Preston v. Liverpool, Manchester &c. Railway*, 5 H. L. Cas. 605; *Morris & Essex R. R. Co. v. Sussex R. R. Co.* 5 C. E. Green (N. J.), 542, 566; *The Caledonia Railway Co. v. The Magistrates of St. Helensburg*, 2 Macq. 391; *Marshall v. Baltimore & Ohio R. R. Co.* 16 How. (U. S.) 314; *Frost v. Belmont*, 6 Allen, 152; *Kerr F. & M.* (1st Am. ed.) 295, 296; *State v. Reed*, 4 H. & McH. 6; *Williamson v. Williamson*, 3 Sm. & M. 715. There seems to be no objection to the employment of an agent to appear before the legislature as a body, or a committee thereof, to procure the recognition of a claim against the state, or to the payment of a compensation for such services. *Sedgwick v. Stanton*, 4 Kernan (N. Y.), 289. Services rendered openly in procuring the passage of laws by advocates disclosing their true relation to the sub-

ject, may be a foundation for a recovery of compensation. *Willey v. Collier*, 7 Md. 273. See *Sedgwick v. Stanton*, *supra*. But a contract to procure, or to endeavor to procure the passage of an act of the legislature by any sinister means, or even by using a personal influence with the members, would be void, as inconsistent with public policy and the integrity of a political institution. *Wood v. McCann*, 6 Dana, 366; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Marshall v. Baltimore & Ohio R. R. Co.* 16 How. (U. S.) 314; *Willey v. Collier*, *supra*; *Frost v. Belmont*, 6 Allen, 152; *Hatzfield v. Gulden*, 7 Watts, 152. So, an agreement for services as agent in attending to claims against the state before the legislature, to be performed by personal solicitation of the members, cannot be enforced, being against public policy and prejudicial to sound legislation. *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361. An agreement on the part of a corporation to grant to individuals certain privileges, in consideration that they would withdraw their opposition to the passage of a legislative act, touching the interest of the corporation, was held to be against sound policy, prejudicial to correct and just legislation, and void, in *Pingry v. Washburn*, 1 Aiken (Vt.), 264 (*a*).]

thorizing them to construct a new line, — has also been held to be good. (c)

6. *Maintenance* of suits, which is a public offence, is where one Champerty and main-
tenance. officiously intermeddles in a suit depending in any court, which no way belongs to him, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. (d) *Champerty* is the purchasing a suit or right of action of another person; or rather, it is a bargain with a plaintiff or defendant, to divide the land or other matter sued for between them, if they prevail at law; whereupon the *champertee* is to carry on the party's suit at his own expense. (e) This also is an offence of a public nature; (e¹) and all contracts which have either of these offences within their object or operation are invalid. (f)

(c) *Taylor v. Chichester &c. Railway Co.* (in Dom. Proc.), L. R. 4 Ap. Ca. 628; reversing the judgment of the exchequer chamber, S. C. L. R. 2 Ex. 356.

(d) Per Williams J. *Radcliffe v. Anderson*, E., B. & E. 819, 825; *Flight v. Leman*, 4 Q. B. 883, 888; *Hawk. Pl. Cr. bk. 1, c. 83*; 4 Bl. Com. 134. See, also, *Sprye v. Porter*, 7 E. & B. 58; *Earle v. Hopwood*, 9 C. B. N. S. 566; [Per Selden J. in *Sedgwick v. Stanton*, 4 Kernan (N. Y.), 293 *et seq.*; per Sanford Chancellor, in *Thalhimer v. Brinkerhoff*, 3 Cowen, 623–644. In *Peck v. Briggs*, 3 Denio, 107, Bronson C. J. said: “In the late revision of the laws [of New York], nothing was left of the old doctrine of maintenance beyond a prohibition against taking a conveyance of lands in suit, buying or selling pretended titles, and conspiracies falsely to move or maintain suits.” And in *Sedgwick v. Stanton*, 4 Kernan (N. Y.), 301, Selden J. said: “I still think, in view of the manifest tendency of modern judicial opinions, as well as of the plain scope and intent of our legislation upon the subject, that not a vestige of the law of maintenance, including that of champerty, now remains in this state [New York], except what is contained in the revised statutes.”] See cases in which it was questioned whether agreements did not amount to maintenance; *Bell v. Smith*, 5 B. &

C. 188; *Williamson v. Henley*, 6 Bing. 299.

(e) Per Williams J. *Radcliffe v. Anderson*, E., B. & E. 819, 825; 4 Bl. Com. 134, 135. See the definition of Champerty, per Wightman J. *Cook v. Field*, 15 Q. B. 460, 471; *Strange v. Brennan*, 10 Jur. 649; and per Best C. J. *Williams v. Protheroe*, 3 Y. & J. 129, 135; and *Tindal C. J. Stanley v. Jones*, 7 Bing. 369, 377. [And per Selden J. in *Sedgwick v. Stanton*, 4 Kernan, 289, 294.]

(e¹) [2 Chitty Cr. Law (4th Am. ed.), 233 note.]

(f) [The plaintiff, an attorney at law, after rendering some services in a suit brought by the defendant in another state where champerty is prohibited, entered into a written agreement in Massachusetts, by which he was to receive for all his services ten per cent. upon the sum recovered. Held, that this agreement was void, but that the plaintiff might recover upon a *quantum meruit*, for his services up to the time of making the agreement. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489. See *Redman v. Sanders*, 2 Dana, 70; *Allen v. Hawks*, 13 Pick. 79; *Rust v. Larue*, 4 Litt. 417; *Caldwell v. Shepherd*, 6 Mon. 392; *Smith v. Thompson*, 7 B. Mon. 305. A contract made in Ohio between an attorney and his client, in which the latter agrees to pay a

Thus, in *Stanley v. Jones* (*g*) it appeared that, by articles of agreement, T. S. covenanted to communicate to the defendant all such information as he, T. S., possessed or could procure, and to use and exert his utmost influence and means, for procuring such evidence as should be requisite, to substantiate the defendant's claims against R. M. and W. S. E.; in consideration of which, the defendant covenanted to pay T. S. one eighth part or share of such sum as should at any time be recovered or obtained, either by suit at law or in equity, from R. M. and W. S. E.; and it was held that the agreement was illegal, as amounting to champerty. (*g*¹) So an agreement by an attorney, to save a party harmless from costs, on his being allowed to retain the half of whatever sums were recovered, has been held to amount to maintenance. (*h*) So, if the attorney, *pendente lite*, purchase the subject-matter of the action, he is guilty of champerty or maintenance. (*i*) And if one who purchases an interest which is the subject of a suit, agree to indemnify the seller against all the costs which have been, or which may be incurred by him in the prosecution of the suit, this amounts to maintenance. (*k*)

But a conveyance to the attorney, of the subject-matter of the action, by way of security for fees due before the conveyance was

certain stipulated sum for the services of the former, dependent upon the contingency of the success of the attorney, is valid; and in case of the attorney's success, the amount stipulated is recoverable at law. *Spencer v. King*, 5 Ham. 183. But if in such case there be a stipulation, that no compromise shall be made without the assent of the attorney, the contract is against public policy and void. *Key v. Vather*, 1 Ohio, 132. An agreement, of which the consideration is the sale of lands held adversely by a third person, is void. *Whitaker v. Cone*, 2 John. Cas. 58; *Belden v. Pitkin*, 2 Caines, 147; *Sweet v. Poor*, 11 Mass. 549. So a promise by a person, out of possession, to pay an agent a certain portion of the proceeds of the land, is void. *Belden v. Pitkin*, 2 Caines, 147.] As to the rule in equity on this subject, see *Prosser v. Edmonds*, 1 Y. & C. 481.

(*g*) 7 Bing. 369.

(*g*¹) [But in New York, it has been held,
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that a contract by which a party agrees to aid another who claims a right to a lot of land by virtue of the provisions of a legislative act, in presenting his claim to the commissioners of the land-office, and in procuring the title, in consideration that he shall have a portion of the land as compensation, is not void on account of champerty, or as being against public policy. *Sedgwick v. Stanton*, 4 Kernan (N. Y.), 289. The rigor of the common law in reference to champerty and maintenance, has been very much relaxed in New York, both by legislation and by judicial decision. *Ib.*]

(*h*) *Re Masters*, 4 Dowl. 18; and see 33 & 34 Vict. c. 28, s. 11.

(*i*) *Simpson v. Lamb*, 7 E. & B. 84; per Lord Campbell, *Anderson v. Radcliffe*, E. & B. 806, 816; and see 33 & 34 Vict. c. 28, s. 11.

(*k*) *Harrington v. Long*, 2 My. & K. 590.

executed, is valid. (*l*) So, where a party agrees to promote a suit, touching a matter in which he has reasonable ground to believe that he has an interest, he is not guilty of maintenance. (*m*) And in *Williams v. Protheroe*, (*n*) where it was agreed between the vendor and purchaser of an estate, that the purchaser, bearing the expense of certain suits commenced by the vendor against an occupier for by-gone rent, should have the rent so to be recovered, and also any sum that could be recovered for dilapidations; and that the purchaser might, at his own expense, use the name of the vendor in any action he might think fit to commence against the occupier, for arrears of rent or dilapidations; it was held, that the agreement was not void, as amounting to champerty. (*o*)

Other cases. 7. An agreement to fight is void, as tending to create a breach of the peace. (*p*)

So an agreement, the natural effect of which is to induce a public officer to neglect his duty, is invalid. (*p*¹)

Thus it was held, under the stat. 6 Geo. 2, c. 31, that parish officers could not legally take any other security from the putative father of a bastard, than such as indemnified them from time to time against the expenses of the maintenance of the child; and that they could not take a sum certain by way of compounding for all future expenses, as it thereby became the interest of the parish to neglect the child. (*q*)

On the same principle, it would seem that an agreement between the town clerk and clerk of the peace of a borough, and an attorney, that the former would, for reward to him, recommend the latter to parties who might want an attorney to conduct prosecutions arising in the town clerk's office, is illegal. (*r*)

(*l*) *Anderson v. Radcliffe*, E., B. & E. 806; *Radcliffe v. Anderson*, Ib. 819.

(*m*) See *Findon v. Parker*, 11 M. & W. 675; *White v. Gardner*, 1 Y. & C. 385.

(*n*) In error from K. B. 3 Y. & J. 129; S. C. 5 Bing. 309.

(*o*) See further as to champerty, *Stevens v. Bagwell*, 15 Ves. jun. 139; *Hartley v. Russell*, 2 S. & S. 244; *Strachan v. Brander*, 1 Eden, 303.

(*p*) Bull. N. P. 16; and see *Hunt v. Bell*, 1 Bing. 1.

(*p*¹) [*Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, 5 Mass. 541; *Ayer v. Hutchins*, 4 Mass. 370; *Marsh v. Gold*,

2 Pick. 284, 291. "Promises to indemnify officers are not in their own nature vicious or void; it is only when they are made as inducements to a known and voluntary violation of duty that they become so." *Parker C. J.* in *Nelson v. Milford*, 7 Pick. 28.]

(*q*) *Cole v. Gower*, 6 East, 110; *Wilde v. Griffin*, 5 Esp. 142; *Beeley v. Wingfield*, 11 East, 47; *Overseers of St. Martin in the Fields v. Warren*, 1 B. & Ald. 491, 495.

(*r*) See *Hughes v. Statham*, 4 B. & C. 187.

So, although an engagement to indemnify a sheriff in the execution of a lawful, or apparently lawful act, is good; (s) yet where the act to be done by him would be a plain violation of his duty, an agreement to protect him from the consequences is void. (t)

So an indemnity bond, given to the sheriff in a case of *disputed property* in goods, to induce him to execute or not to execute a *fieri facias* against such goods, is clearly lawful. (t¹) But it seems that a bond to a sheriff, the condition of which recited that the sheriff, by virtue of a *fi. fa.*, had taken in execution the goods of A., upon a judgment against him; and that the sheriff, at the request of A., one of the obligors, had quitted possession, and agreed to return *nulla bona*, and then to indemnify the sheriff for so doing, would be illegal. (u)

(s) *Arundel v. Gardiner*, Cro. Jac. 652; *Blacket v. Crissop*, 1 Ld. Raym. 279; *Benskin v. French*, 1 Sid. 132; [Parker C. J. in *Nelson v. Milford*, 7 Pick. 28.]

(t) *Beawfage's case*, 10 Co. 102; *Featherston v. Hutchinson*, Cro. El. 199; *Martyn v. Blithman*, Yelv. 197; *Blithman v. Martin*, 2 Bulst. 213; *Morris v. Chapman*, T. Jones, 24; [*Shotwell v. Hamlin*, 23 Miss. (Cush.) 156; *Cumpston v. Lambert*, 18 Ohio, 81. An agreement made as an indemnity against the consequences of an illegal or immoral act, to be done at a future period, is void; but a person may indemnify himself against the consequences of an unlawful act already done. *Kneeland v. Rogers*, 2 Hall, 579. See per Holt C. J. 11 Mod. 93; Holt, 203, S. C.; 6 Mod. 225; 1 Caines, 460; 14 John. 381; Parker C. J. in *Nelson v. Milford*, 7 Pick. 28. A promise to indemnify against a trespass is valid, unless the promisor show that the promisee knew the act to be a trespass and illegal. *Stone v. Hooker*, 9 Cowen, 154. Where two persons are claiming title to personal property adversely to each other, and one of them calls upon a third to assist in removing it, and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of re-

moval was a trespass. *Avery v. Halsey*, 14 Pick. 174. Notice of the true owner's claim to the property, given by him to such assistant while the title was in dispute, was held not to be conclusive evidence that the assistant knew that the property was not in his employer. *Avery v. Halsey*, 14 Pick. 174; *Jacobs v. Pollard*, 10 Cush. 287; *Moore v. Appleton*, 26 Ala. 633. An express promise of indemnity being made to such assistant by one who claimed no interest in the property, and such assistant having acted on the faith of it; it was held, that the damage incurred was a valid consideration, and that an action on the promise might be maintained. *Avery v. Halsey*, 14 Pick. 174. The plaintiff, at the request of the defendant, entered upon the land of A., which the defendant claimed as his. This was held a sufficient consideration to support a promise from the defendant to indemnify the plaintiff. *Al-laire v. Ouland*, 2 John. Cas. 52.]

(t¹) [*Marsh v. Gold*, 2 Pick. 284; *Train v. Gold*, 5 Pick. 380; *Foster v. Clark*, 19 Pick. 329, 333.]

(u) *Wright v. Lord Verney*, 3 Dougl. 240. [An agreement by a third person to indemnify an officer for neglecting his duty, in the service of a precept, being founded in an illegal consideration, is void. *Hodsdon v. Wilkins*, 7 Greenl. 113; *Ayer v. Hutchins*, 4 Mass. 370; *Churchill v. Perkins*, 5 Mass. 385; *Marsh v. Gold*, 2 Pick.

So, contracts in the way of trade, made with an alien enemy, are, by the common law, illegal. (*x*)

So, an agreement entered into for the purpose of evading the provisions of a public statute, is void. Thus, an agreement entered into, in order to get a person admitted to practise as an apothecary, after serving an apprenticeship for two years only, instead of five as required by the statute, is void. (*y*) So, an agreement is void, whereby A., B., and C. agree to purchase a ship, which is to be registered in the names of A. and B. only. (*z*)

And it has been questioned, whether an agreement for the working of a line of railway, by parties other than the railway company, is not illegal, as being contrary to public policy. (*a*)

But it was held, that a stipulation in a contract for the purchase of a ship, that a certificate should be delivered to the purchaser by the builder, for the purpose of enabling the former to obtain a register, as owner, under the ship registry act, (*b*) before the ship was in a sufficiently forward state for the measurements required to be made by that act, did not render such contract illegal. (*c*)

284, 291. So a promise to deliver the debtor at the time, if the sheriff will neglect to arrest his body, is void. *Denny v. Lincoln*, 5 Mass. 385. So, a promise to deliver the debtor at the time is void, if the sheriff has unlawfully permitted him to go at large. *Fanshot v. Stout*, 1 South. 319; *Brown v. Getchell*, 11 Mass. 16, per Sewall J. So, a promise to indemnify the sheriff for permitting an escape. *Lowry v. Burney*, 2 Chipman, 11. Or to indemnify the sheriff for not returning an execution. *Greenwood v. Colcock*, 2 Bay, 67. A bond given to an officer in consideration of an act that he has no legal authority to do, is void. *Moore v. Allen*, 3 J. J. Marsh. 621. So, a bond of indemnity given to an officer to induce him to do an act which the law requires of him as a part of his duty. *Mitchell v. Vance*, 5 Monroe, 529; *Gilmore v. Lewis*, 12 Ohio, 281; *Callaghan v. Hallet*, 1 Caines, 104. But a note, given to an officer in consideration of his relinquishing, or forbearing to make an attachment of the goods of a third person on a writ against him, is valid. *Foster v. Clark*,

19 Pick. 329. See *Miller v. Gould*, 2 Tyler, 439.]

(*x*) *Potts v. Bell*, 8 T. R. 548; *The Hoop*, Rob. Adm. Rep. 196; *Furtado v. Rodgers*, 3 B. & P. 191, 199; and see *Esposito v. Bowden*, 7 E. & B. 763; [*Griswold v. Waddington*, 16 John. 439; *Amory v. McGregor*, 12 John. 287. But if the plaintiff have been deceived by the defendant, and did not know that he was trading with an enemy, he may maintain an action after the return of peace. *Muson v. Fales*, 16 Mass. 334. See *Coolidge v. Ingle*, 13 Mass. 46.] As to the effect of the "Naturalization Act, 1870," *quere?* see *ante*, 259.

(*y*) *Prole v. Wiggins*, 3 Scott, 601. See 55 Geo. 3, c. 194, s. 15.

(*z*) *Battersby v. Smith*, 3 Madd. 110.

(*a*) Per Lords Justices *Johnson v. Shrewsbury & Birmingham Railway Co.* 22 L. J. C. 921.

(*b*) 3 & 4 Will. 4, c. 55. For the provisions now in force, as to the registering of ships, see 17 & 18 Vict. c. 104, ss. 30-54; 18 & 19 Vict. c. 91, ss. 9-15.

(*c*) *Goss v. Quinton*, 3 M. & G. 825.

SECTION III.

Contracts rendered Illegal by Statute.

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| <ol style="list-style-type: none"> 1. In general. 2. Gaming and horse-racing. 3. Stock-jobbing. 4. Illegal companies or associations. 5. Sales of offices. | <ol style="list-style-type: none"> 6. Contracts made on Sundays. 7. Illegal charges on benefices. 8. Contracts in consideration of not opposing a bankrupt's discharge. |
|---|--|

1. In General.

We have stated, that if any part of the *entire* consideration for a promise, or any part of an *entire* promise, not in its nature divisible, be illegal, either at common law or by statute, the *whole* agreement is void. (*k*) But that, where a contract contains an *independent* stipulation, such as an agreement in general restraint of trade, (*l*) which, although void, does not affect or form part of the entire consideration or promise; there the invalid stipulation may be rejected, and the remainder of the contract shall stand. (*l*¹)

Rule where part of entire consideration or promise is illegal.

It is laid down, however, in some of the older cases, that there is a distinction between a deed or condition which is void *in part by statute*, and one which is void in part at *common law*. "A stat-

(*k*) *Ante*, 973; Featherston *v.* Hutchinson, Cro. El. 199; Bridge *v.* Cage, Cro. Jac. 103; Morris *v.* Chapman, Sir T. Jones, 24; Scott *v.* Gillmore, 3 Taunt. 226; Vin. Abr. Action, Assumpsit; [Deering *v.* Chapman, 22 Maine, 488; Ladd *v.* Dillingham, 34 Maine, 316; Carleton *v.* Woods, 28 N. H. 290; Carlton *v.* Whitcher, 5 N. H. 196; Hinde *v.* Chamberlin, 3 N. H. 225; Crawford *v.* Morrell, 8 John. 253; Mackie *v.* Caines, 5 Cowen, 547; Raguet *v.* Roll, 7 Ohio, 76; Thayer *v.* Rock, 13 Wend. 53. Where A. & W. employed R. to sell for them on commission tickets in a lottery not authorized by law, under an agreement that R. should be considered as the purchaser of all the tickets he did not sell or return by a particular day; it was held, that although the purchase of the tickets by R. was not illegal, yet as the agreement with respect to the purchase was only a part of an entire contract, which was illegal, the whole was void. Roby *v.* West, 4 N. H. 285. But

where an agreement is made upon several express considerations, one of which if it stood alone, would have supported it, the union with an illegal consideration shall not destroy it. But if one of the considerations is in violation of a statute, or *malum in se*, the whole contract fails. Jarvis *v.* Peck, 1 Hoff. 479. The agreement in this case contained a stipulation restraining the carrying on of a trade generally, which was clearly illegal, and it also contained a stipulation to keep secret the mode of converting cast-iron into malleable iron, which was held valid. *Ib.*]

(*l*) See Green *v.* Price, 13 M. & W. 695; S. C. (in error), 16 M. & W. 346; M'Allen *v.* Churchill, 11 Moore, 483; [Lange *v.* Werker, 2 Ohio (N. S.), 519.]

(*l*¹) [*Ante*, 973, note (*h*); Leavitt *v.* Blatchford, 5 Barb. 9; Carleton *v.* Woods, 28 N. H. 290; Lange *v.* Werker, 2 Ohio (N. S.), 159; Robinson *v.* Green, 3 Met. 159.]

ute," it has been said, "is like a tyrant,—where he comes he makes all void; but the common law is like a nursing father,—it makes only void that part where the fault is, and preserves the rest." And it seems to have been considered, that if part of a deed or condition be contrary to statute, the remainder, even though it be distinct, shall also be void. (*m*)

But this distinction must be understood to apply only to cases where the statute enacts, that an agreement or deed made in violation of its provisions shall be *wholly* void. (*n*) And if this be not so, then, provided the good part be separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. (*o*)

Thus, the 9 Geo. 2, c. 36, (*p*) makes void all gifts or grants to charitable uses. But where a deed contained several limitations, one of which was void as being to a charitable use, the court held that the statute did not vitiate the other limitations, although they were included in the same deed. (*q*) So, it was decided upon the property tax acts, that a provision in a deed in violation thereof, that the tax should not be allowed or deducted from payments to be made, did not affect the validity of the rest of the instrument. (*r*) So it was held, that although a bill of sale for transferring the property in a ship, by way of mortgage, might be void, as such, for want of reciting the certificate of registry, as required by the statute; yet the mortgagor might be sued upon his personal covenant contained in the same instrument, for the repayment of the

(*m*) *Maleverer v. Redshaw*, 1 Mod. 35, 36; *Norton v. Simmes*, Hob. 14; *Mosdel v. Middleton*, 1 Vent. 237; per *Lawrence J. Morgan v. Horseman*, 3 Taunt. 244, 245; 1 Wms. Saund. 66 a, note (1); per *Wilmot C. J. Collins v. Blantern*, 2 Wils. 351; per *Lord Ellenborough C. J. Newman v. Newman*, 4 M. & S. 70.

(*n*) *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440. And see per *Gibbs C. J. Doe v. Pitcher*, 6 Taunt. 369; *Norton v. Simmes*, Hob. 14; per *Gibbs C. J. Greenwood v. Bishop of London*, 5 Taunt. 746.

(*o*) *Biddell v. Leader*, 1 B. & C. 327; *Kerrison v. Cole*, 8 East, 231; and see *Payne v. Mayor of Brecon*, 3 H. & N.

572; *Pallister v. Mayor of Gravesend*, 9 C. B. 774; [*ante*, 973, note (*h*)]; *Tracy v. Talmage*, 4 Kernan (N. Y.), 162; *Curtis v. Leavitt*, 1 Smith (N. Y.), 9; *Carleton v. Woods*, 28 N. H. 290; *Robinson v. Green*, 3 Met. 159; *Rand v. Mather*, 11 Cush. 1, cited in note below; *Leavitt v. Blatchford*, 5 Barb. 9; *Hook v. Gay*, 6 Barb. 398.]

(*p*) Construction of this act, *Doe v. Hawthorn*, 2 B. & Ald. 96. Copyholds within it, *Doe v. Waterton*, 3 B. & Ald. 149.

(*q*) *Doe d. Thompson v. Pitcher*, 6 Taunt. 359.

(*r*) See *Redshaw v. Balders*, 4 Taunt. 57; *Fuller v. Abbott*, Ib. 105; *Howe v. Synge*, 15 East, 440; and see 1 Wms. Saund. 66 a, note (*d*).

money lent. (s) And in like manner, although the grant of a rentcharge on a benefice may be void as regards the charge; yet a personal covenant in the same deed of grant, to pay the rent, is not therefore invalid. (t)

But it seems, that if part of an *entire* parol contract be void under the statute of frauds for want of writing, the agreement is void *in toto*. (u)

Entire contract partly void under statute of frauds.

Clearly, if an act of parliament *expressly prohibit* the transaction in respect whereof an agreement is entered into, (x) such agreement will be invalid. (x¹) And so a contract may be illegal, although it be not in contravention of the specific directions of a statute, provided it be opposed to the general policy and intent thereof. (y) But it was at one time made a question whether, if a statute contained no distinct prohibitory clause, and only inflicted a *penalty* on the doing of a certain act, the law would sanction the contract, and hold that the payment of the penalty was the only consequence resulting from the transgression of the statute; or whether it would treat the agreement as void, and thereby add a punishment which the statute had not expressly provided.

Matters prohibited under a penalty.

(s) *Kerrison v. Cole*, 8 East, 231; and see *Biddell v. Leader*, 1 B. & C. 327; *Mortimer v. Fleeming*, 4 B. & C. 120. The transfer of a ship need not now contain a recital of the register, 17 & 18 Vict. c. 104, s. 55.

(t) *Monys v. Leake*, 8 T. R. 411; *Kerrison v. Cole*, 8 East, 231; *Gibbons v. Hooper*, 2 B. & Ad. 734. See, also, *Greenwood v. The Bishop of London*, 5 Taunt. 727, where the court separated the simoniacal part of a transaction from that part which was legal, and allowed the latter to prevail. But simony is a common law as well as statutable offence; and see *Newman v. Newman*, 4 M. & S. 66.

(u) *Mechelen v. Wallace*, 7 A. & E. 49; *Head v. Baldrey*, 6 A. & E. 459; [*Loomis v. Newhall*, 15 Pick. 159. But in *Rand v. Mather*, 11 Cush. 1, it was held, that an agreement, which is void in part under the statute of frauds, is not necessarily void *in toto*. As where A. contracted to do certain work for B., but suspended labor because of B.'s failure to pay according to the contract, C. told A. to finish the con-

tract, and he would pay him in full, and A. did so, relying upon C.'s promise, it was held, that A. could recover of C. for the work performed after such promise, but not for that before. In *Rand v. Mather*, *supra*, the case of *Loomis v. Newhall*, *supra*, was in part overruled. See *Irvine v. Stone*, 6 Cush. 508; *Andrews v. Ives*, 8 Conn. 368; 23 Am. Jurist, 7, 8; *Crawford v. Monell*, 8 John. 253; *Page v. Monks*, 5 Gray, 492.]

(x) As an agreement to perform at an unlicensed theatre. *Levy v. Yates*, 8 A. & E. 129. See *Gallini v. Laborie*, 5 T. R. 242; and see *De Begnis v. Armistead*, 10 Bing. 107.

(x¹) [*Territt v. Bartlett*, 21 Vt. 184; *Bank of Rutland v. Parsons*, 21 Vt. 199; *Bell v. Quin*, 2 Sandf. (S. C.) 146.]

(y) *Steaines v. Wainwright*, 8 Scott, 280; [per *Shaw C. J.* in *White v. Bass*, 3 Cush. 449, 450; *Sharp v. Teese*, 4 Halst. 352; *Craig v. State of Missouri*, 4 Peters, 410; *Bartle v. Coleman*, 4 Peters, 184; *Gulick v. Ward*, 5 Halst. 87; *Fuller v. Dame*, 18 Pick. 472.]

In some of the older cases it seems to have been considered, that the contract would not be void, if there were no distinct prohibition, and the act stipulated for were only forbidden under a penalty. (z) And Lord Ellenborough appears to have been of opinion, that an unlicensed surgeon might sue for his fees, although the stat. 3 Hen. 8, c. 11, prohibited persons, under a penalty, from practising as surgeons without a license. (a) But in *Bartlett v. Vinor*, (b) Holt C. J. said: "Every contract made for, or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter: *because a penalty implies a prohibition*, though there are no prohibitory words in the statute." And it is now quite settled, that this dictum contains the true rule on the subject now under consideration. (c)

Accordingly it has been held, that a sale of coals without the delivery by the vendor of the ticket required by statute, (d) is

(z) See *Comyns v. Boger*, Cro. Eliz. 485.

(a) *Gremare v. La Clerc Bois Valon*, 2 Camp. 144.

(b) *Carth*. 252,

(c) *Taylor v. Crowland Gas Co.* 10 Exch. 293; *Cundell v. Dawson*, 4 C. B. 376, 399; *Little v. Poole*, 9 B. & C. 192; *Cannan v. Bryce*, 3 B. & Ald. 179; per *Tindal C. J. De Begnis v. Armistead*, 10 Bing. 107, 110. For instances of the application of this rule, see *Fergusson v. Norman*, 6 Scott, 794; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Houston v. Mills*, 1 Moo. & Rob. 325; *Foster v. Taylor*, 5 B. & Ad. 896; [*Miller v. Post*, 1 Allen, 434; *Pattee v. Greely*, 13 Met. 284; *White v. Bass*, 3 Cush. 449, 450, per *Shaw C. J.*; 23 Am. Jurist, 8-15; *Wheeler v. Russell*, 17 Mass. 258; *Coombs v. Emery*, 14 Maine, 404; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. Degrand*, 15 Mass. 39; *Seidenbender v. Charles*, 4 Serg. & R. 159; *Mitchell v. Smith*, 1 Binn. 118; *S. C.* 4 Dall. 269; *Sharp v. Teese*, 4 Halst. 352; *Territt v. Bartlett*, 21 Vt. 184; *Bancroft v. Dumas*, 21 Vt. 456; *Bank of Rutland v. Parsons*, 21 Vt. 199; *Harris v. Runnells*, 12 How. (U. S.)

80; *Allen v. Hawks*, 13 Pick. 82. Under the act of Pennsylvania, 11th April, 1795, 3 Smith Laws, 209, a contract for the purchase and sale of lands in that state, under the Connecticut title, is unlawful and void, and no action can be maintained on such contract, though the act merely inflicts a penalty upon the offender. *Mitchell v. Smith*, 4 Dall. 269. Where a penalty is imposed upon the buyer and seller of wood by the cord, not being measured by a wood measurer, the sale will be prohibited by implication, and the seller cannot recover. *Pray v. Burbank*, 10 N. H. 377. No action lies on a note, the consideration of which was the sale of shingles not of the size prescribed by Stat. of Mass. 1783, ch. 15. *Wheeler v. Russell*, 17 Mass. 258. So, where a depositor in a bank agrees to let the money remain on deposit until a certain day, in violation of Rev. Stat. Mass. c. 36, § 57. *White v. Franklin Bank*, 22 Pick. 181; *Atlas Bank v. Nahant Bank*, 3 Met. 581. See *Springfield Bank v. Merrick*, 14 Mass. 322; *Schermerhorn v. Talman*, 4 Kernan (N. Y.), 93.]

(d) 1 & 2 Vict. c. ci, s. 3.

void. (e) So, a contract to carry on a business in partnership, in a manner prohibited by statute under a penalty, is void. (f) So the stipulations in a lease, which is expressed to be granted for a purpose forbidden by statute, cannot be enforced. (g) So it has been held, under the stat. 39 Geo. 3, c. 79, s. 27, — which provides that printers shall affix their names to any books they print, and that, if they omit so to do, they shall forfeit 20*l.* for each copy, — that a printer who neglects to affix his name to a book, according to the provisions of that statute, cannot recover for labor or materials used in printing it. (h) So in *Drury v. Defontaine*, (i) the court said: “It has been determined, that the holding a fair on a Sunday would be illegal, but that the contract would not be void. The law is since changed; and if any act is forbidden under a penalty, a contract to do it is now held void.” And in *Ex parte Dyster*, (k) which was a case in bankruptcy before Lord Eldon, — and where the question was, whether a broker of the city of London could legally act as principal in the sale and purchase of goods, he being bound under a penalty by the regulations of the city, not to trade as a principal, — his lordship said: “The first point of objection resolves itself into this, whether the proposition, that a broker of the city of London cannot act as a principal, be founded on a prohibition of general law, or a mere municipal regulation? If on the former, it is quite clear that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted.” (l)

But if a contract be made in violation of the provisions of a statute, and the effect of such statute be merely to impose a penalty on the offending party, for the benefit of the revenue, and not to prohibit the act done, or avoid the contract itself: the fact of such provisions not having been complied with will not invalidate the contract. (m) And, accordingly, it has been held, that the provisions of the excise license act, (n) — which subject to penalties any

Rule where the statute imposes a penalty, merely for the purpose of revenue.

(e) *Cundell v. Dawson*, 4 C. B. 376; *Little v. Poole*, 9 B. & C. 192.

(i) 1 Taunt. 136.

(f) *Armstrong v. Lewis*, 2 C. & M. 274.

(k) 2 Rose Bank. Ca. 349.

(g) *Gas Light Co. v. Turner*, 7 Scott, 779.

(l) And see *Cope v. Rowlands*, 2 M. & W. 157; *Kemble v. Atkin*, Holt N. P. C. 435, 436; *Coates v. Hatton*, 3 Stark. 61.

(h) *Bensley v. Bignold*, 5 B. & Ald. 335. See, further, *Stephens v. Robinson*, 2 C. & J. 209.

(m) See *Bailey v. Harris*, 12 Q. B. 905.
(n) 6 Geo. 4, c. 81, ss. 25, 26.

dealer in or seller of tobacco, who shall not have his name painted on his entered premises, in manner therein mentioned, or who shall sell tobacco without taking out the license required for that purpose, — do not avoid a contract for the sale of tobacco, made by a dealer who has not complied with those provisions. (*o*)

Nor will a contract, which was not illegal when made, become illegal by relation; although the party making it was bound by law, under a penalty, to do a subsequent act which he has neglected to do. Thus, an attorney may recover for work done during the period allowed him for entering his certificate, although he may have become liable to a penalty for not entering it before the expiration of that period. (*p*)

And where the law is altered by statute, pending an action, the rights of the parties will be decided according to the law as it existed at the time the action was commenced, unless the statute shows a clear intention on the part of the legislature to vary such rights. (*q*)

2. Gaming and Horse-racing.

It seems that, at common law, contracts by way of gaming were lawful. (*r*) But this state of the law was from time to time materially altered by statute; (*s*) and, at length, it was enacted by the 8 & 9 Vict. c. 109, s. 18, “that all contracts or agreements, whether by parol or in writing, by way of gaming, or wagering, should be null and void; and that no suit should be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made.”

And it has been held, that a colorable contract for the sale and

(*o*) *Smith v. Mawhood*, 14 M. & W. 452, recognizing *Johnson v. Hudson*, 11 East, 180; and see per *Tindal C. J. Ferguson v. Norman*, 6 Scott, 794, 809.

(*p*) *Eyre v. Shelley*, 6 M. & W. 269, 277; 1 *Smith, L. C.* 169 b.

(*q*) *Hitchcock v. Way*, 6 A. & E. 943.

(*r*) *Sherbon v. Colebach*, 2 Vent. 175. The French law “does not allow an action for a debt at play; but games proper in the exercise of feats of arms, foot-races,

horse or chariot races, tennis, and other sports of the same nature, which require address and agility of body, are excepted, — subject to the power of the court to reject the demand when the sum appears to be excessive.” *Code Civil*, book 3, tit. 3, chap. 1, arts. 1965, 1966.

(*s*) 16 Car. 2, c. 7; and 9 Anne, c. 14; repealed by 8 & 9 Vict. c. 109, s. 15, which also repeals so much of the 18 Geo. 2, c. 34, as relates to the 9 Anne, c. 14,

purchase of railway shares, the intention being merely to pay "differences," is a contract within this section. (*t*) So, a deed given by the defendant to the plaintiff, purporting to secure the repayment of money lent by the former to the latter, but which was actually advanced upon an agreement between them that, out of it, the defendant should pay the plaintiff money which he had won from the defendant by betting, would be void under this statute. (*u*) And so, where there was a *bonâ fide* contract between the plaintiff and the defendant, for the sale and purchase of goods; but the price was to depend on the result of a wager, as to the price at which a former lot of similar goods had been sold by the plaintiff to the defendant; this was held to be a contract by way of gaming and wagering, within the statute. (*x*)

And upon the latter clause of the above section it was held by Stuart V. C. that where the amount of a bet on a horse-race had been paid by the loser into the hands of A., upon the promise of the latter to pay it to the winner; and A. died before he had paid the money to the winner; a claim by the winner, to be paid the amount out of the assets of the deceased, must be disallowed. (*y*)

This enactment, however, seems not to apply to bills of exchange or promissory notes given to secure gaming debts; for, by the 15th section, the law as to these securities is left in the state to which it was altered by the 5 & 6 Will. 4, c. 41. And by this latter statute, so much of the stat. 9 Anne, c. 14, as provided "that all notes and bills given for any money or other valuable thing, won by gaming, or by betting on the sides of such as do game, or for repaying any money lent for such gaming or betting, or lent at the time or place of such play, to any person so gaming or betting, should be void," is repealed; and, instead thereof, it is enacted, that every such note or bill shall merely be deemed and taken to have been made, drawn, accepted, or given for an illegal consideration, but shall not be absolutely void. Such instruments, therefore, are not void in the hands of a *bonâ fide* holder, without notice. (*z*) And where A. and B. jointly made bets with third persons on a horse-race, and B. received the money and gave A. a bill, accepted by C. — who was not a party to the betting — for his share; it was held that the 8 & 9 Vict. c. 109, s.

(*t*) Grizewood v. Blane, 11 C. B. 538.

(*u*) Hill v. Fox, 4 H. & N. 359.

(*x*) Rourke v. Short, 5 E. & B. 904.

(*y*) Beyer v. Adams, 26 L. J. C. 841.

(*z*) Per Cur. Hay v. Ayling, 16 Q. B.

423, 431; 20 L. J. Q. B. 171, 174.

18, did not preclude A. from recovering from C. the amount of such bill. (a)

Nor does the 8 & 9 Vict. c. 109, apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game. (b) And it appears that where two persons agree to contend in a lawful game, *e. g.* a foot-race, and each deposits a sum of money with a stakeholder, on the terms that the whole is to be paid over to the winner, this is a contribution towards "a prize or sum of money," which is protected by this proviso. (c) But the proviso in question is confined to cases, where there is a *bonâ fide* intention to subscribe or contribute to a prize or sum of money, which is to be awarded to the winner of the game. And, accordingly, it has been held, that a sum of money won at the game of "pool," — which it seems is played on the terms of each player contributing from time to time during the game, according to its chances, to a stake which is carried off by the ultimate winner, — is not within such proviso. (d)

It appears that cricket, (e) chess, bowls, and other games of skill, were games within the statute of Anne. (f) But it would seem that the proviso contained in the 8 & 9 Vict. c. 109, s. 18, extends to all games of mere skill; (g) and, indeed, generally, to all games which were made illegal only by virtue of the repealed statutes. (h)

If in an action for work and labor it appear that the defendant retained the plaintiff to play at an illegal game, and that the action is brought to recover a recompense for his having played at such game, the plaintiff will not be entitled to recover. (i)

And so it has been held, that money knowingly lent for the

(a) *Johnson v. Lansley*, 12 C. B. 468.

(b) See s. 18.

(c) *Batty v. Marriott*, 5 C. B. 818. A horse-race for a sweepstakes of 2*l.* each, was held not to be within the 9 Anne, c. 14; *Applegarth v. Colley*, 10 M. & W. 723.

(d) *Parsons v. Alexander*, 5 E. & B. 263.

(e) *Hodson v. Terrill*, 1 C. & M. 797; *Jeffreys v. Walters*, 1 Wils. 220.

(f) *Sigel v. Jebb*, 3 Stark. 1. It seems that *backgammon* was considered to be a lawful game, 13 Geo. 2, c. 12, s. 19. See *Bac. Abr. Gaming (B.)*. Billiards, see *Rex v. Badford, Lofft*, 29.

(g) See 8 & 9 Vict. c. 109, s. 1.

(h) See *Batty v. Marriott*, 5 C. B. 818. The game of skittles would, probably, be held to be lawful within this proviso. See

Foot v. Baker, 5 M. & G. 335.

(i) *Coates v. Hutton*, 3 Stark. 61.

purpose of enabling the borrower to game or play therewith at an illegal game, is not recoverable. (*k*)

But, inasmuch as gaming contracts are not rendered illegal by the stat. 8 & 9 Vict. c. 109, but only void, (*l*) it is held that an action will lie to recover money knowingly paid by the plaintiff, at the defendant's request, to a person to whom the former has lost the amount by gaming. (*m*) If, however, the game itself were illegal, or the money had been won by some fraud or unlawful device, so as to render the winning of it illegal under the 8 & 9 Vict. c. 109, s. 17, perhaps it would be otherwise. (*n*)

So, it is held, that if money be won at play, or lent for the purpose of gambling, in a country where gaming is not illegal, such money may be recovered in the courts of this country. (*o*)

And where a bond had been given to S. & U., — to whom the obligor had lost bets on horse-races which he was unable to pay, — in order to prevent them from “posting” the ^{or on a bond.} obligor at Tattersall's as a defaulter; it was held that this constituted a good consideration for the bond, independently of the racing debt; and that the bond was therefore valid. (*p*)

By the statute 14 Geo. 3, c. 48, s. 1, no insurance shall be made on the life of any person, *or on any other event* wherein the person for whose use or benefit, or on whose ac- ^{Insurances.} count such policy shall be made, shall have no interest, *or by way of gaming or wagering*. And upon this enactment it was decided in *Paterson v. Powell*, (*q*) that an engagement subscribed by several persons, each for himself, to pay, in consideration of 40 guineas, the sum of 100*l.* in case Brazilian shares should be at a certain price, on a certain day, was void as a wagering policy.

This species of gaming would now appear to be entirely regu-

(*k*) *M'Kinnell v. Robinson*, 3 M. & W. 434; and see *Webb v. Brooke*, 3 Taunt. 6; *Cannan v. Bryce*, 3 B. & Ald. 184. [The value of a horse lent to the defendant at a gaming-table, and delivered over by him to the winner, was held to be recoverable by the lender, although lent for the purpose of enabling the defendant to stake on the game. *Carson v. Rambert*, 2 Bay, 560.]

(*l*) Sect. 18.

(*m*) *Knight v. Cambers*, 15 C. B. 562;

Oulds v. Harrison, 10 Exch. 572; and see *Rosewarne v. Billing*, 15 C. B. N. S. 316; *Knight v. Fitch*, 15 C. B. 566.

(*n*) See *M'Kinnell v. Robinson*, 3 M. & W. 434; *Cannan v. Bryce*, 3 B. & Ald. 184; *Alcinbrook v. Hall*, 2 Wils. 309.

(*o*) *Quarrier v. Colston*, 1 Ph. 147.

(*p*) *Bubb v. Yelverton*, L. Rep. 9 Eq. 471.

(*q*) 9 Bing. 320.

lated by the statute 18 Geo. 2, c. 34; for the statute 13 Geo. 2, c. 19 — which provided that no horse should be entered, or
 Horse-racing: start or run for any plate, *except by the owner*; that no person should enter and start more than one horse for the same prize; and that no plate, money, or thing should be run for, or advertised to be run for, by any person, unless such plate, prize, or sum of money were of the full, real, and intrinsic value of 50*l.* or upwards; and that every race that should be run for any plate, prize, or sum of money, should be begun and ended on the same day — was repealed, as to the above provisions, by the 3 Vict. c. 5, s. 1; whilst the enactments of the 18 Geo. 2, c. 34, so far as they relate exclusively to horse-racing, appear not to be affected by the 8 & 9 Vict. c. 109. (*r*)

And since the repeal of the 18 Geo. 2, c. 19, it has been held that a horse-race for money given by third persons, by
 when legal. way of prize, is not illegal; (*s*) and that a steeple-chase for 50*l.* or upwards, is a lawful race within the 18 Geo. 2, c. 34. (*t*) But where, to an action of debt for money had and received, the defendant pleaded that a certain race was about to be run, and that an illegal game, called a lottery, was set up by the defendant, for certain subscribers of 1*l.* each, — in the whole amounting to 155, — to be paid to the defendant under regulations which were in substance as follow: that the subscriber whose name should be drawn out of a box, next after the name of the horse which should be placed first in the race, should be entitled to receive from the defendant 100*l.*; and the plea then alleged, that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff, under the regulations, became entitled to the 100*l.*; it was held, that the plea disclosed a transaction within the prohibition of the lottery acts, 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119. (*u*)

(*r*) See s. 15. In the case of *Batty v. Marriott*, 5 C. B. 818, Wilde C. J. said that it was quite clear that horse-racing "was not intended to be discouraged" by that statute. *Ib.* 828.

(*s*) *Applegarth v. Colley*, 10 M. & W. 723.

(*t*) *Evans v. Pratt*, 3 M. & G. 759; 4 Scott N. R. 378.

(*u*) *Allport v. Nutt*, 1 C. B. 974. [A

wager of sixty dollars on a horse-race is illegal in South Carolina, and no action can be sustained on such wager. *Hasket v. Wootan*, 1 Nott & McCord, 180. See, also, on the subject of racing, *Brown v. Brody*, 1 Car. Law R. 90; *Wood v. Wood* 2 Murph. 172; *Forrest v. Hunt*, 2 Murph. 458. A note, given for a bet upon a horse-race, is absolutely void in Mississippi. *Martin v. Terrell*, 12 Sm. & M. 571.]

3. Stock-jobbing.

The statute 7 Geo. 2, c. 8 (made perpetual by 10 Geo. 2, c. 8), contained certain provisions, the object of which was to prevent the practice of stock-jobbing. But by the 23 & 24 Vict. c. 28, it was enacted that, from and after the passing of that act — *i. e.* 14th June, 1860, — both the above-mentioned acts should be repealed.

Stat. 7 Geo.
2, c. 8.23 & 24 Vict.
c. 28.

4. Illegal Companies or Associations.

By the 18th section of the 6 Geo. 1, c. 18, — “The Bubble Act,” — it was enacted, “that the undertakings and attempts therein described, and all other public undertakings and attempts tending to the grievance, prejudice, and inconvenience of the public, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments, and transfers, and all other matters and things whatsoever, for furthering, countenancing, or proceeding in any such undertaking or attempt; or more particularly the acting or presuming to act, as a corporate body or bodies; the raising, or pretending to raise transferable stock or stocks; the transferring, or pretending to transfer or assign, any share or shares in such stock or stocks, without legal authority, either by act of parliament, or by any charter from the crown, to warrant such acting as a body corporate; or to raise such transferable stock or stocks, or to transfer shares therein: and all acting, or pretending to act, under any charter formerly granted from the crown, for particular or special purposes therein expressed, by persons who do or shall use, or endeavor to use, the same charters for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments, of such stock, not intended or designed by such charter to be raised or transferred; and all acting, or pretending to act, under any obsolete charter, become void or voidable by non-user or abuser, or for want of making lawful elections which were necessary to continue the corporation thereby intended, shall forever be deemed to be illegal and void, and shall not be practised or in any wise put in execution.”

“Bubble
Act.”

By the 19th section, all such unlawful undertakings were to be deemed common nuisances.

And the 20th section pointed out the mode, in which merchants and traders might have their remedy against the undertakers.

By the 6 Geo. 4, c. 91, however, which recites, "that it is expedient that the several undertakings, attempts, practices, acts, matters, and things in the said act of 6 Geo. 1 mentioned, should be adjudged and dealt with in like manner as the same might have been judged and dealt with according to the common law, notwithstanding the said act," the 18th, 19th, and 20th sections of the 6 Geo. 1, c. 18, were repealed; and the result of this was, to leave in full operation *the common law* relative to such schemes as, whether mentioned in the 6 Geo. 1, or not, could be considered injurious to the public welfare. (x)

Formerly, indeed, it was thought that the 6 Geo. 1, c. 18, was merely declaratory of the common law on this subject. (y) But it now appears to be quite decided, that the raising of transferable shares in the stock of a company is not, of itself, an offence at common law; (z) and it would even appear to have been doubted, whether the mere presuming to act as a corporation is of itself an illegal act. (a) But if there were any evidence that the creation of such assignable shares had been productive of injury or inconvenience to the queen's subjects, that would render their creation illegal. (b) And so, if it appeared that the scheme in respect of which such shares were created, was one manifestly impracticable, such scheme would be held to be a mere bubble, and illegal. (c)

Stats. 25 &
26 Vict. c. 89;
30 & 31 Vict.
c. 131.

Now, however, the formation of joint-stock companies, established after the 2d November, 1862, (d) for the purpose of carrying on the business of banking, or any

(x) See per Cur. *Harrison v. Heathorn*, 6 M. & G. 81, 140; per Best C. J. *Duvergier v. Fellowes*, 5 Bing. 248; S. C. (in error) 10 B. & C. 826; in Dom. Proc. 1 C. & F. 39. See the decisions upon the bubble act, *The King v. Webb*, 14 East, 406; *Pratt v. Hutchinson*, 15 East, 511; *Davies v. Hawkins*, 3 M. & S. 488; *Nockels v. Croshy*, 3 B. & C. 814; *Strong v. Harvey*, 3 Bing. 304.

(y) See *Duvergier v. Fellowes*, 5 Bing. 248, 267.

(z) Per Cur. *Harrison v. Heathorn*, 6 M. & G. 81, 140.

(a) Per Cur. *Garrard v. Hardey*, 5 M. & G. 471, 484, remarking on the case of *Duvergier v. Fellowes*, *supra*.

(b) *Harrison v. Heathorn*, 6 M. & G. 81.

(c) *Harvey v. Collett*, 10 Jur. 603, 606, V. C. E.

(d) The formation of joint stock companies, established before the 2d November, 1862, for the purpose of carrying on "any trade or business having gain for its object," except "banking or insurance," was regulated by the 19 & 20 Vict. c. 47, ss. 2, 4, and the 20 & 21 Vict. c. 14. The former of these statutes, s. 107, repealed the 7 & 8 Vict. c. 110, as to any company completely registered under that act, but not until such company had obtained registration under the repealing act. But by the 20 & 21 Vict. c. 14, s. 23, the 19 & 20

other business which has for its object the acquisition of gain by the company, is regulated by the statutes 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131. And since those statutes, the power of such companies to allot shares, or to act as corporations, depends on their being registered pursuant thereto. (e)

And it is hardly necessary to state, that a contract relating to the purchase of shares in an illegal company or association, cannot be enforced. (f)

5. Sales of Offices.

The statute 5 & 6 Edw. 6, c. 16, ss. 2, 3, (g) avoids all agreements for the *sale or deputation* of any office which “in any wise touches or concerns the administration or execution of justice, or the receipt, controlment, or payment of the king’s treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of the king’s tenements or customs, or any other administration or necessary attendance to be had, done, or executed in any of the king’s custom-houses, or the keeping of any of the king’s towns or fortresses, used or appointed for a place of strength and defence, or which concerns or touches any clerkship to be occupied in any court of record wherein justice is to be ministered.”

The 4th section provides that the act shall not extend to any office whereof any person is seised of any estate of inheritance; nor to any office of partnership, or of the keeping of any park, house, manor, garden, chase, or forest.

The statute 49 Geo. 3, c. 126, s. 1, provides, “that the statute of Edw. 6 shall extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown; and all commissions, civil, naval, or military; and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment, superin-

Vict. c. 47, s. 107, was repealed; and it was enacted that the 7 & 8 Vict. c. 110, the 10 & 11 Vict. c. 78, and “The Limited Liability Act, 1855,” should remain unrepealed, as to any company completely registered, which had not obtained registration under the 19 & 20 Vict. c. 47, until such time as such company obtained registration under the 19 & 20 Vict. c. 47, and the 20 & 21 Vict. c. 14. As to what com-

panies were within the 7 & 8 Vict. c. 110, see *Reg. v. Whitmarsh*, 15 Q. B. 600; *Bear v. Bromley*, 18 Q. B. 271; 21 L. J. Q. B. 354; *Lawton v. Hickman*, 9 Q. B. 563; *Young v. Smith*, 15 M. & W. 128.

(e) See 25 & 26 Vict. c. 89, s. 18; 30 & 31 Vict. c. 131, s. 2.

(f) *Josephs v. Pebrer*, 3 B. & C. 639.

(g) See *Bac. Abr. Offices*, 2 Bl. Com. 37, n. (38), Chit. ed.

tendence, and control of the lord high treasurer, or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master-general and principal officers of the ordnance, the commander-in-chief, the secretary-at-war, the paymaster-general of the forces, the commissioners of the affairs of India, the commissioners of the excise, the treasurers of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners for transports, the commissary-general, the storekeeper-general, and also the principal officers of *any other public department* or office of government, in any part of the United Kingdom, or any of his majesty's dominions; (*h*) and to all offices, commissions, places, and employments belonging to, or under the appointment or control of the East India Company."

The 7th section excepts the sale and exchange of certain offices in the palace, and commissions in the army, according to regulations made in that behalf.

The 9th section excepts offices excepted by the statute of Edw. 6, and offices which were legally saleable before the act of the 49 Geo. 3, and in the gift of any person by virtue of any office, of which such person is possessed under any patent or appointment, for his life.

The 10th and 11th sections except *lawful deputations*, and annual payments, *out of the fees*, to any person *formerly holding the office*.

In an old case, (*i*) in which the statute of Edw. 6 came under consideration, the court held, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits arise to so much. But where the reservation or agreement is, not to pay out of the profits, but to pay generally a certain sum, which must be paid at all events, such contract is void by the statute.

And it seems that a similar rule of construction is to be applied

(*h*) This extends to the colonies. See *Greville v. Atkins*, 9 B. & C. 462. affirmed in Dom. Proc. 1 Bro. P. C. 135; *Culliford v. De Cardenell*, 2 Salk. 466.

(*i*) *Godolphin v. Tudor*, 2 Salk. 468;

What contracts are void within these statutes.

to the 49 Geo. 3, c. 126. Thus, in *Greville v. Atkins*, (*k*) where it appeared that a bond — after reciting that A. B. was colonial secretary of Tobago, and had appointed C. D. to be his deputy to execute the office and receive the fees, in consideration of his paying thereout to A. B. the annual sum of 450*l.*, by equal half-yearly payments, — was conditioned for the punctual payment of that sum, without saying “out of fees;” and the defendant pleaded, that the bond was given in pursuance of an agreement to pay that sum at all events; upon which issue was taken and found for the defendant; it was held that, even supposing the agreement to be inconsistent with the language of the bond, it was competent to the defendant to plead and prove it, in order to show that the bond was given upon an illegal consideration; and that the fact found by the jury showed, that the bond was illegal and void by virtue of the statute.

So, in *Austin v. Gwinnell*, (*l*) it was decided that the office of clerk to the deputy registrar of the prerogative court of Canterbury, was not an office connected with the administration of justice within the meaning of the stat. 5 & 6 Edw. 6, c. 16, so as to prevent its being aliened or charged; and that an alienation of, or charge on the profits of such office, was not contrary to the policy of the law which restricted the alienation of the income of a public officer. In that case the lord chief baron said, that the object of the statute “was to prohibit corrupt contracts by which a right to an office, or a right to exercise any of its duties, might be obtained; with a view that persons worthy of such trusts might be advanced to them.” But his lordship was of opinion, that the contract in question had no relation to that subject. For the situation of the defendant, although called an office, was represented as being that of a mere clerk, assisting the deputy registrars, and receiving emoluments for business done at the pleasure of his superiors; and, accordingly, it did not appear to him that he could be considered an officer of the court.

It has, however, been decided that an assignment to trustees, of all the emoluments and profits which, during the life of A., and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time

(*k*) 9 B. & C. 462.

(*l*) 3 Y. & J. 136, in the exchequer in equity.

being, upon trust to pay the interest arising on certain debts due from A., and from time to time to render the surplus and residue, after satisfying the trusts, to A., is invalid. (*m*) So an agreement by A., for reward, to resign the offices of "collector of assessed taxes," and "sub-distributor of stamps," and to use his best endeavors to procure B. to be appointed to those offices, was held to be void within the above statutes. (*n*) So it was held, that a cadetship in the service of the East India Company was an office, commission, place, or employment within the third section of the 49 Geo. 3, c. 126; and that a contract to procure a nomination or appointment thereto was illegal. (*o*) And it was also held, that the resignation for a pecuniary consideration, of the position of major in a regiment in the East India Company's service, was illegal under sect. 4 of that statute; and that a security given for the payment of the money was void. (*p*)

So we have seen, that although the sale of a public office, or the deputation thereof, may not fall within the enactments of these statutes, it will be void *at common law*, if it be injurious to the public interest, and contrary to *public policy*. (*q*) And, further, that the general rule, even at common law, is, that no action will lie upon a contract for procuring the appointment to, or for the sale or relinquishment of a public office, if the contract be *concealed* from the party who has the right of appointment. (*r*)

And wherever the sale of an office is illegal, a bond for the price, (*s*) or a promise to pay a commission or percentage, in consideration of the promisee procuring a purchaser for the office, is not binding. (*t*)

(*m*) *Palmer v. Bate*, 2 B. & B. 673.

(*n*) *Hopkins v. Prescott*, 4 C. B. 578.

(*o*) *Reg. v. Charretie*, 13 Q. B. 447; 13 Jur. 450.

(*p*) *Graeme v. Wroughton*, 11 Exch. 146.

(*q*) *Ante*, 990.

(*r*) *Ib.*

(*s*) *Lee v. Coleshill*, Cro. El. 529.

(*t*) *Stackpoole v. Earle*, 2 Wils. 133.

[Where a person receives a deputation to a public office, which entitles him by statute to a certain percentage upon the fees and emoluments of the office of his

principal, and on receiving his appointment enters into an agreement to perform the duties of his office at a fixed salary, such agreement being in violation of the act against buying and selling offices, is void, although it be not certain that the stipulated sum would be less than the percentage allowed by law. *Tappan v. Brown*, 9 Wend. 175. No action lies by the deputy for his portion of the fees and emoluments received by his principal, after such corrupt agreement, although he has performed the duties of the office. *Ib.* See *Gray v. Hook*, 4 Comst. 449.]

But still there are some offices which may be the subjects of sale, if such sale take place under the authority and with the consent of those who have the power of appointment. (u) And it has been held, that a promise by one of two candidates for the office of under-sheriff, that, in consideration of his opponent desisting from his endeavor to obtain such office, he would pay him a sum of money, is binding. (x)

6. Contracts made on Sundays.

It is enacted by the statute 29 Car. 2, c. 7, s. 1, (y) that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity, (y¹) and charity only excepted); (z) and that every person of the age of fourteen years, offending in the premises, shall forfeit 5s. (z¹)

(u) *Blachford v. Preston*, 8 T. R. 92, 94.

(x) *Parker v. Brown*, Cro. Jac. 612.

(y) The statute, 3 Car. 1, c. 1, prohibits carriers with horses from travelling upon Sundays. This extends to the driver of a van travelling between two towns. *Ex parte Middleton*, 3 B. & C. 164. A contract on a Sunday to take a place in a stage coach is good. *Sandiman v. Breach*, 7 B. & C. 96.

(y¹) [By a work of "necessity," as mentioned in the exception to the prohibition of labor, business, or work, on the Lord's day, in Mass. Rev. Stat. c. 50, § 1, is not meant a physical and absolute necessity; but any labor, business, or work which is morally fit and proper to be done on that day, is a work of necessity within the statute. *Flagg v. Millbury*, 4 Cush. 243. In New Hampshire the statute prohibits labor, business, or work in one's "secular calling;" and the execution and delivery of a promissory note on Sunday has been held to be business of one's secular calling, and therefore void. *Allen v. Deming*, 14 N. H. 133.]

(z) Baking provisions for customers on Sundays is within this exception. *Rex v. Cox*, 2 Bur. 787; *Rex v. Younger*, 5

T. R. 449; and see section 3 of the act. Baking rolls on Sunday is within the act. *Crepps v. Durden*, Cowp. 641. See 34 Geo. 3, c. 61, as to bakers; and 11 & 12 Will. 3, c. 24, s. 13, as to watermen. Mackerel may be sold, except during divine service. 10 & 11 Will. 3, c. 24, s. 14.

(z¹) [23 Amer. Jurist, 10, 11. Formerly no action could be maintained in New Hampshire on a contract made on Sunday. *Allen v. Deming*, 14 N. H. 133. The prevailing opinion seemed to be that in that state all secular contracts made on the Sabbath were void. *Clough v. Davis*, 9 N. H. 500. In this last case it was held that if a note be written on Sunday, and given to an agent to be delivered to the payee on Monday, who accordingly delivers it, and after the delivery the maker promises to pay it, this will be a ratification of the note. See, also, *Lovejoy v. Whipple*, 18 Vt. 379, to the same effect. But see *Smith v. Bean*, 15 N. H. 577; *Allen v. Deming*, 14 N. H. 133; *Frost v. Hull*, 4 N. H. 157; *Shaw v. Dodge*, 5 N. H. 462; and see *contra*, *Butler v. Lee*, 11 Ala. 885. By the Revised Statutes of New Hampshire, those acts only on Sunday are prohibited, that are done to the disturbance of others. And under this provision it has

This statute, as it affects the *sale of goods* on Sunday, has been already considered. (a)

been held that a plea, that an original writ was issued on Sunday, is defective, if it does not allege it to have been done to the disturbance of others. *Clough v. Shepherd*, 31 N. H. 490. It was, however, also held, under this same provision, that any business tends to the disturbance of others and is consequently prohibited, which withdraws the attention from the appropriate duties of the Sabbath and turns it to other things; as, a contract for the sale of a mare, accompanied with the execution and delivery of a promissory note for the price, comes within the prohibition, and no action can be sustained upon the note. *Varney v. French*, 19 N. H. 233. In Pennsylvania, a note given on the Sabbath is void, and no action can be sustained upon it. *Kepner v. Keefer*, 6 Watts, 231. All contracts in Vermont of an ordinary secular character, and which are not properly works of necessity or charity, if finally consummated on the Sabbath, are void. So that no action can be maintained, either upon the contract or for the recovery of what may have been done under the contract. *Adams v. Gay*, 19 Vt. 358; *Lyon v. Strong*, 6 Vt. 219. A promissory note, executed upon Sunday, in consummation of a contract previously made, not being a work of necessity or charity, is void. *Lovejoy v. Whipple*, 18 Vt. 379. Still such contracts are not so far void but that they may be re-affirmed upon some other day. *Adams v. Gay*, 19 Vt. 358. See *Merriam v. Stearns*, 10 Cush. 257. A note, though written and signed on Sunday, if not delivered till some other day, will not be void. *Lovejoy v. Whipple*, 18 Vt. 379; *Sumner v. Jones*, 24 Vt. 317; *Barren v. Pettes*, 18 Vt. 385. And in all cases of contracts so made on the Sabbath, where either party has done anything in execution of the contract, it is competent for him, upon another day, to demand of the other party a return of the thing delivered,

or, where that is impracticable, compensation; and, if the other party refuse, the original contract becomes thereby affirmed, and thus binding to the same extent as if made on the latter day. *Adams v. Gay*, 19 Vt. 358; *Sargent v. Butts*, 21 Vt. 99; *Sumner v. Jones*, 24 Vt. 317. This is considered an exception to the general rule, in regard to illegal contracts, but is indispensable to secure parties from fraud and overreaching, practised upon Sunday, by those who know their contracts are void, and that they are not liable *civilliter* even for frauds practised upon that day. *Ib.* So, a contract entered into in a state where there is no law prohibiting secular labor on the Sabbath, is not considered in Vermont, so far *contra bonos mores*, as not to form the proper subject-matter of an action in the courts of Vermont. *Adams v. Gay*, *supra*. In Massachusetts, recovery was allowed on a note made on Sunday, in *Gear v. Putnam*, 10 Mass. 312. But this case turned on a question of pleading, and is no authority for the validity of a note made on Sunday, not being a work of necessity or charity, where that question is presented. Such a note cannot be enforced by the original payee; see *Robeson v. French*, 12 Met. 24; *Bosworth v. Swansey*, 10 Met. 363; *Clapp v. Smith*, 16 Pick. 247; *Cranston v. Goss*, 107 Mass. 439, 440, 441; but it may be enforced by a *bonâ fide* indorsee. *Cranston v. Goss*, 107 Mass. 439. In *Bosworth v. Swansey*, 10 Met. 363, it was held that a person who travels on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him, while so travelling, by reason of a defect in a highway, which the town is by law obliged to repair. See *Bryant v. Biddeford*, 39 Maine, 193; *Jones v. Andover*, 18 Allen, 18; *Stanton v. Metropolitan Railway Co.* 14 Allen, 485; *Hall v. Corcoran*, 107 Mass. 253. It has been held that the owner of a horse, who knowingly

(a) See *ante*, 588, and note (*f*²).

7. Illegal Charges on Benefices.

It is enacted by the statute 13 Eliz. c. 20, — which was repealed by the 43 Geo. 3, c. 84, but revived, as regards this provision, by the 57 Geo. 3, c. 99, (b) — “that all 13 Eliz. c. 20.

lets him on the Lord's day, to be driven to a particular place, but not for any purpose of necessity or charity, cannot maintain an action against the hirer for an injury done to the horse by his immoderate driving, in consequence of which the horse afterwards dies; although the injury is occasioned in going to a different place, and beyond the limits specified in the contract. *Gregg v. Wyman*, 4 Cush. 322. And the correctness of this decision was maintained in *Whelden v. Chappel*, 8 R. I. 230; but denied in *Woodman v. Hubbard*, 25 N. H. 67; and in *Morton v. Glos-ter*, 46 Maine, 420; and the decision was directly overruled in *Hall v. Corcoran*, 107 Mass. 251. See *Way v. Foster*, 1 Allen, 408. An action cannot be maintained for a deceit practised in the exchange of horses on the Lord's day. Nor for a false warranty made on that day. See *Robeson v. French*, 12 Met. 24; *Hulet v. Stratton*, 5 Cush. 539; *Bradley v. Rea*, 14 Allen, 20. Nor on a bond executed and delivered on that day. *Pattee v. Greely*, 13 Met. 284. And it has more recently been held in Massachusetts, that contracts made in violation of the Lord's day are absolutely void, so that no ratification will make them binding. *Day v. McAllister*, 15 Gray, 433; *Ladd v. Rogers*, 11 Allen, 209; *Bradley v. Rea*, 14 Allen, 20; *Hazard v. Day*, 14 Allen, 487. In Alabama, where a horse is sold on Sunday, and a note taken for the purchase-money on the same day, both the sale and note are void, and the property in the horse remains in the vendor. *Dodson v. Harris*, 10 Ala. 566. See *Butler v. Lee*, 11 Ala. 885; *Salt-marsh v. Tuthill*, 13 Ala. 390. So in Michigan: *Adams v. Hamell*, 2 Douglass, 73. So in Maine: *Towle v. Larrabee*, 26 Maine, 464; *ante*, 588, n. (f²). In Ohio, the prohibition of “common labor” embraces the business of “trading, bartering, sell-

ing, or buying any goods, wares, and merchandise;” and the ordinance of the city of Cincinnati, prohibiting such “trading,” &c., on Sunday, is void as to those who conscientiously do observe the seventh day of the week as the Sabbath. *Cincinnati v. Rice*, 15 Ohio, 225. But see *Specht v. Commonwealth*, 8 Barr, 312. In Indiana, a replevin bond, executed on Sunday, is void, its execution being in violation of the statute, which prohibits common labor on that day. *Link v. Clemmens*, 7 Blackf. 479. And for this reason, where goods were replevied on Saturday, and the statute required the replevin bond to be executed within twenty-four hours after the replevin, it was held that Sunday should not be counted. *Ib.* In New York it was held that a transfer of personal property on Sunday was valid, and the title to the property passed. *Boynton v. Page*, 13 Wend. 425. See *Styles v. Smith*, 12 Wend. 57. But in an action of deceit in the sale of property, where the sale took place in the State of Connecticut on the Sabbath, it was held that, as by the laws of Connecticut, all secular business on the Sabbath is prohibited, the action could not be sustained, either as founded on the deceit or on the contract of sale. *Northrop v. Foot*, 14 Wend. 248. In order to avoid a note made on the Lord's day in Kentucky, it should appear that the note was made in pursuance of certain work done on that day. *Ray v. Catlett*, 12 B. Mon. 532. Where a certain number of the hours of the Sabbath are fixed upon by law, as constituting, and included within the Lord's day, a contract cannot be avoided because made on that day, except upon proof that it was made within the prescribed hours. *Nason v. Dinsmore*, 34 Maine, 391.]

(b) Per Parke J. in *Doe d. Broughton v. Gully*, 9 B. & C. 344, 351; *Shaw v. Pritchard*, 10 B. & C. 241.

chargings of benefices with cure, thereafter, with any pension or with any profit out of the same to be yielded or taken, other than rents to be reserved upon leases thereafter to be made, according to the meaning of that act, (c) should be utterly void;" and the intention of this statute was, that the rents reserved on permitted leases should be enjoyed by the incumbents themselves, and not, by corrupt and indirect means, be transferred to other uses. (d)

Accordingly it has been held, that a composition with a clergyman, in consideration that his future income may be received by a trustee, and, after providing for a curate, applied in liquidation of his debts, is void under this statute. (e) So, a demise of his benefice by a parson, expressly to *secure an annuity*, is void under this statute. (f) So where a rector, by indenture, demised his rectory with the tithes, &c., to the defendant for a certain term, if he, the rector, should so long live, at the yearly rent of 980*l.*; and, as part of the transaction, executed a second indenture, which operated as an equitable assignment, or valid appropriation of so much of the said rent, as was necessary to pay certain debts due from the rector to A. and B.: it was held that such assignment was a charge on the benefice within the statute; and that the demise was therefore void. (g) And so if a warrant of attorney, given to secure an annuity, refer to a deed which is void under the statute, as charging the benefice, and incorporate the terms of the deed; or if the objection be in any other way presented to the notice of the court upon the face of the instrument itself, it will be void. (h)

But where, in such a case, a warrant of attorney, with a defeasance *in the common form*, is given as an additional security, so that the instrument, upon the face of it, is free from objection, the court will not interfere to set it aside. (i) Nor will the court look beyond the warrant of attorney for evidence of the intention of the parties, or read affidavits in proof of such intention. (k)

And the court has refused to set aside a warrant of attorney,

(c) As to the power of incumbents of benefices to make farming leases, see 5 Vict. sess. 2, c. 27.

(d) Per Cur. *Walthew v. Crafts*, 6 Exch. 1, 22.

(e) *Alchin v. Hopkins*, 1 Bing. N. C. 99.

(f) *Ib.* See cases there cited; and *Flight v. Salter*, 1 B. & Ad. 673.

(g) *Walthew v. Crafts*, 6 Exch. 1.

(h) *Alchin v. Hopkins*, 1 Bing. N. C. 99; and *Saltmarshe v. Hewett*, 1 A. & E. 812.

(i) *Johnson v. Brazier*, 1 A. & E. 624; *Gibbons v. Hooper*, 2 B. & Ad. 734; *Britten v. Wait*, 3 B. & Ad. 915.

(k) *Bendry v. Price*, 7 Dowl. 753; *Bishop v. Hatch*, 1b. 763.

given as a collateral security by a clergyman on purchasing an annuity, even although it referred to a bond which had also been given by him to secure the annuity, and the bond contained a reference to a deed of grant, whereby the benefice was illegally charged; (*l*) the reason being, that the reference to the bond in the warrant of attorney, amounted to no more than a description of the bond, and did not incorporate the terms of the deed of grant with the warrant of attorney, so as to make the latter operate as a charge on the benefice. But if the warrant of attorney expressly authorize the sequestration of the living, the court will set aside the warrant of attorney, as well as the judgment and sequestration under it. (*m*)

We have seen, however, (*n*) that the grant of an annuity by a clergyman, and his covenant to pay it, may be good, although the same deed purports to create a charge upon his benefice, which is void under the statute.

8. Contracts in Consideration of not opposing a Bankrupt's Discharge.

The "Bankruptcy Act, 1861," enacts, (*o*) "that any contract, covenant, or security made or given by a bankrupt or other person, with, to, or in trust for any creditor, for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a rehearing of or to appeal against the same, shall be void; and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead, in general, that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence; provided always, that no such security, if a negotiable security, shall be void as against a *bonâ fide* holder thereof for value, without notice of the consideration for which it was given." (*p*)

(*l*) Moore *v.* Ramsden, 7 A. & E. 898; Colebrooke *v.* Layton, 4 B. & Ad. 578.

(*m*) Newland *v.* Watkin, 9 Bing. 113; and see Moore *v.* Ramsden, 7 A. & E. 907.

(*n*) *Ante*, 1003.

(*o*) 24 & 25 Vt. c. 134, s. 166. "The Bankruptcy Act, 1869," does not contain any similar provision. So that the validity of a contract, made in consideration of not opposing the discharge of a bank-

rupt under that act, would have to be decided by the common law. As to this, see *ante*, 994.

(*p*) See 12 & 13 Vict. c. 106, s. 202. Under this section it was held, that a security given by a bankrupt to a creditor, in consideration of his forbearing to oppose the bankrupt's last examination, was not void; Taylor *v.* Wilson, 5 Exch. 251; and that the section did not apply to a bill accepted by the bankrupt in blank, before,

SECTION IV.

Contracts rendered voidable by Mistake or Fraud.

1. Mistake.

[IN contracts founded on agreement, whether simple contracts or contracts under seal, the agreement, apparently complete and sufficient to establish the contract, may be vitiated by causes influencing the agreement, which under certain conditions may render it void of legal effect. The causes which may thus qualify the legal effect of an apparently valid agreement are mistake, and fraud.

Mistake is occasioned by the ignorance or misconception of some matter, by reason of which the agreement apparently made is not the agreement intended to be made, or is one which would not have been made but for the mistake; and the question arises as to the effect of such mistake upon the operation of the agreement in creating a contract. (*a*)

The mistake may be that of one party only; or there may be a mistake of both parties respecting the same matter, and thus there arise two different conditions of the question, which are governed by considerations of a different character.

The mistake of one party only is attended with different consequences accordingly as the other party is, or is not, cognizant of the mistake.

The law judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them; consequently, an agreement cannot be affected by the mistake of either party in expressing his intention or in his motives, of which the other party has no knowledge, and the party who has entered into an agreement under such mistake is bound by the agreement actually made, and cannot assert his mistake in avoidance of the agreement.

but not dated or drawn until after the allowance of his certificate. *Goldsmid v. Hampton*, 5 C. B. N. S. 94. See, also, 6 Geo. 4, c. 16, s. 125; 5 & 6 Vict. c. 122, s. 40; and *Sievers v. Boswell*, 3 M. & G. 524; *Hankey v. Cobb*, 12 Q. B. 490; *Rose v. Main*, 1 Scott, 127; *Birch v. Jervis*, 1 C. & P. 379. (*a*) See 1 Sugden V. & P. (8th Am. ed.) 5, note (*f*), 243, and note (*d*), and cases cited.

[The defendant sold to the plaintiff a hundred chests of tea out of a specific cargo, to be equal to a sample shown at the time of the sale, which the defendant then believed to be a sample of the cargo, but which was not in fact a sample of that cargo, but of a different tea; it was held, that the defendant had not the right of avoiding the contract by giving notice to the plaintiff of the mistake respecting the sample; and in an action for not delivering the tea, a plea on equitable grounds, to the effect that he had given notice of the mistake, and of his intention to treat the contract as void on account of the mistake, was held a bad plea. (b)]

At a sale by auction a lot was knocked down to the defendant at the price of eighty-eight guineas, and delivered to him immediately; shortly after receiving the articles, he stated that he supposed the bidding had been forty-eight guineas, and refused to accept them; it was held that he might set up this mistake in order to show that his acceptance of the goods was not such an acceptance of the ownership as was required by the statute of frauds in order to charge him with the contract without a memorandum in writing. (c) In this case, it will be observed, the question was whether parol evidence of the contract was admissible, and not whether a mistake of one party only could be asserted for the purpose of escaping from a contract made by him. If the contract could have been proved, the defendant, it is submitted, would have been held bound by the bidding which he had in fact made.

Upon this principle, in the case of a written agreement, it is not competent for either of the parties to avoid its effect by merely showing that he understood the terms in a different sense from that which they bear in their grammatical construction and legal effect. (d)

Where a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract. If a person purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less, on that account, bound to pay for it. (e) A

Mistake in
motive of
party.

(b) *Scott v. Littledale*, 8 E. & B. 815; (e) *Chanter v. Hopkins*, 4 M. & W. 399; 27 L. J. Q. B. 201. *Ollivant v. Bayley*, 5 Q. B. 288; *Mild-*

(c) *Phillips v. Bistolli*, 2 B. & C. 511. *may v. Hungerford*, 2 Ver. 243; *Prideau*

(d) See *Hotson v. Browne*, 9 C. B. N. *v. Bunnett*, C. B. N. S. 613. S. 442; 30 L. J. C. P. 106; *Powell v. Smith*, L. R. 14 Eq. 85.

[person executed a deed in the belief that another person would also execute it, but did not deliver it as an escrow conditional upon such execution, and was not betrayed into executing it by any fraud or misrepresentation; he was held bound by the deed, although the person expected by him to execute failed to do so. (*f*) A person being desirous of becoming a freeholder of Essex, contracted to purchase a house on the north side of the river Thames, which he supposed to be in that county, but which proved to be in Kent; the contract was held binding, and he was compelled in equity to complete the purchase. (*g*)

A court of equity will in some cases refuse to grant a plaintiff the peculiar remedy of specific performance of a contract which the defendant has entered into under a mistake, although the plaintiff was not privy to the mistake or implicated in its origin; but a court of equity will not rectify or rescind a contract merely on the ground of a mistake of one of the parties in making it. (*h*) Thus, specific performance was refused in the following instances: against the purchaser of a lot at an auction, who had by mistake bid for and bought a different lot than that which he had intended; (*i*) against a vendor who had reserved a bidding for the protection of the estate, but his agent by mistake omitted to bid, and the estate was knocked down at a smaller price than he intended; (*j*) against a vendor, where before the sale by auction the printed particulars and conditions of sale had been altered in writing in a material point, of which the purchaser was not aware, and the auctioneer by mistake signed

(*f*) *Cumberlege v. Lawson*, 1 C. B. N. S. 709; 26 L. J. C. P. 120.

(*g*) *Shirley v. Davis*, cited 6 Ves. 678; 7 Ves. 270; but see 1 Bro. C. C. 440 (2). "But this," says Sir Edward Sugden, "would not now be followed." 1 Sugden V. & P. (8th Am. ed.) 330. See *Magenis v. Fallon*, 2 Mol. 588, 589.

(*h*) *Alvanley v. Kinnaird*, 2 Mac. & G. 1; *Sells v. Sells*, 1 Drew. & Sm. 42; 29 L. J. C. 500; *Swaisland v. Dearsley*, 29 Beav. 430; 30 L. J. C. 652; 1 Sugden V. & P. (8th Am. ed.) 160, note (*r*), and cases cited; *Sawyer v. Hovey*, 3 Allen, 331; *Canedy v. Marcy*, 13 Gray, 373; *Stockbridge Iron Co. v. Hudson River Iron Co.* 102 Mass. 48; *Andrews v. Essex Ins. Co.*

3 Mason, 10; *Green v. Morris*, 1 Beasley (N. J.), 170; *Durant v. Bacot*, 13 N. J. Ch. 201; *Shay v. Pettes*, 35 Ill. 360; *Brown v. Lamphear*, 35 Vt. 252; *Smith v. Mackin*, 4 Lansing (N. Y.), 41; *Nevius v. Dunlap*, 33 N. Y. 676.

(*i*) *Malins v. Freeman*, 2 Keen, 25; 1 Sugden V. & P. (8th Am. ed.) 215, 314; *James v. State Bank*, 17 Ala. 69; *Spurr v. Benedict*, 99; *Greene v. Bateman*, 2 Wood. & M. 359; *Wuesthoff v. Seymour*, 7 C. E. Green (N. J.), 66; *Gilroy v. Alis*, 22 Iowa, 174; *Kyle v. Kavanagh*, 103 Mass. 356; *Western R. R. Corp. v. Babcock*, 6 Met. 346.

(*j*) *Mason v. Armitage*, 13 Ves. 25.

[the contract on a copy of the particulars which had not been altered; (*k*) against the vendor of an estate who had contracted to sell under the mistaken notion that he was the owner of the fee, but who had only a limited estate; (*l*) against a vendor who had agreed by mistake to sell the whole of an estate, of which he was entitled only to a part; (*m*) against a landlord who had agreed to let a farm, a particular portion of which he had not intended to include in the lease; (*n*) against a landlord who had signed an agreement for a lease in which he had omitted by mistake to specify that he required a premium of 500*l.* for the lease. (*o*)

Where the mistake of the one party is known to the other at the time of making the contract, the fact that the latter knows of the mistake, may have an important effect upon the validity of the contract.

Mistake of
one party
known to
the other.

If he has himself by misrepresentation caused the mistake for the purpose of obtaining the contract, his conduct may amount to fraud, which is the subject of separate consideration.

If he knows of the mistake of the other party but is not responsible for causing it, and in making the agreement is merely silent respecting it, the question seems to depend upon the nature of the mistake.

If the mistake is in the expression of the agreement, it would seem that he could not hold the other party to an expression of intention which he knew to be not in accordance with his real intention, and, in equity at least, the agreement would be held to be void. (*p*)

If the mistake is not in the agreement itself, but in some fact materially inducing the agreement, the question seems to depend upon the nature of the contract. In contracts relating to certain matters the one party is bound to inform the other party of all he knows concerning the matter of the contract so as to prevent all mistake or misapprehension in the latter party; thus, in contracts of insurance it is a condition of the contract that the insured should

(*k*) *Manser v. Back*, 6 Hare, 443; and see *Swaisland v. Dearsley*, 29 Beav. 430; 30 L. J. C. 652.

(*l*) *Howell v. George*, 1 Madd. 1; and see *Hood v. Oglander*, 34 Beav. 513, 519; 34 L. J. C. 528, 529.

(*m*) *Wheatley v. Slade*, 4 Sim. 126.

(*n*) *Marquis Townshend v. Stangroom*, 6 Ves. 328.

(*o*) *Wood v. Scarth*, 2 K. & J. 33.

(*p*) See *Garrard v. Frankel*, 30 Beav. 445; 31 L. J. C. 604.

[inform the insurer of every circumstance material to the risk insured against, and the concealment by the insured of any such circumstance, however innocent, avoids the contract. But unless the nature of the contract imports such a condition, the mere knowledge in the one party of a mistake in the other party, without fraud, seems, in general, to constitute no sufficient ground in law for avoiding their agreement. (*q*)

Both parties may be involved in a mistake respecting the same matter. Such mistake may occur in the expression of their agreement, or in some matter inducing their agreement, or in some matter to which the agreement is to be applied ; which cases require separate consideration.

A mistake may be made by both parties in expressing their agreement, where the parties, having agreed upon certain terms, further agree to reduce those terms into writing, and to be bound by the written document as containing the terms of their agreement, but an error is made in reducing the terms into writing, so that the writing agreed upon as conclusive between them does not contain the agreement intended to be made. The rule of law here applies that the agreement in writing cannot be varied by external evidence ; consequently, the parties are bound in law by the written document which they have accepted as their agreement. (*r*)

The plaintiff made a written agreement with the defendant to do work for him in certain houses "in South Street and Southampton Street," and brought an action upon the agreement, stating it in the declaration according to its terms ; under the plea of *non assumpsit* it was held that the plaintiff was entitled to the verdict on proof of the written agreement, and that evidence was not admissible on the part of the defendant to show that the word "and" was inserted by mistake, and that the agreement really intended to be made was for work in houses "in South Street, Southampton Street." (*s*) A policy of insurance was made on the profits of a

(*q*) See *Carter v. Boehm*, 3 Burr. 1905 ; *The Elysville Co. v. The Okisko Co.* 1 Smith v. Hughes, L. R. 6 Q. B. 597 ; 1 Md. Ch. 392 ; *Knight v. Bunn*, 7 Ired. Eq. 77 ; *Toomer v. Lucas*, 13 Grattan, 705.

(*r*) 1 Sugden V. & P. (8th Am. ed.) 2. 158, 161, and note (*a*), and cases cited, 165 ; *Sugden V. & P.* (8th Am. ed.) 161, note Martin v. Pycroft, 2 De G., M. & G. 785 ; (*a*).

[cargo to be carried by a particular ship "beginning the adventure from the loading on board the ship;" the plaintiff was not permitted to vary the terms of the policy by a correspondence, showing that the contract was intended to include an insurance against the profits being lost by reason of a loss of the ship during her voyage to the port of loading, although the premium was at a higher rate than would have been charged for an insurance not covering such risk. (t)]

Where the mistake in a written agreement is so obvious on the face of it as to leave no doubt of the intention of the parties without the assistance of external evidence, the contract is construed according to the obvious intention of the parties. Accordingly, where it was manifest on the face of an instrument that one name had been written by mistake for another, the court read the instrument with the mistake corrected. (u) So, where in a bond the condition was written that it should be void if the obligor did "not" pay a sum of money, the court recognized the "not" as inserted by mistake, and read the bond without it. (v)

A bond stated that the obligor became bound in 7700, without adding any denomination, but the condition showed that the bond was given to secure the payment of certain sums of money, reckoned in pounds sterling, in manner therein mentioned; the court held that the intention sufficiently appeared from the whole bond, that the obligor should become bound in 7700 pounds sterling, and that the word "pounds" might be supplied. (w) So the word "month" in a written agreement, which *prima facie* means lunar month, has been construed by the context as meaning *calendar month*. (x)

A bill of exchange was headed with the figures £245 and was drawn upon a stamp sufficient for that amount, but was expressed in words in the body of the bill to be drawn for two hundred pounds; it was held to be a bill for £200, and evidence was not admitted to show that it was intended to be for £245, and that the words "and forty-five" were omitted by mistake. (y) An agreement dated 24 October referred to a bill of exchange "payable at

(t) *Halhead v. Young*, 6 E. & B. 312; 25 L. J. Q. B. 290.

(u) *Wilson v. Wilson*, 23 L. J. C. 697.

(v) Case cited by Lord St. Leonards, 23 L. J. C. 697, 703.

(w) *Coles v. Hulme*, 8 B. & C. 568.

(x) *Lang v. Gale*, 1 M. & S. 111; R.

o. Chawton, 1 Q. B. 247.

(y) *Saunderson v. Piper*, 5 Bing. N. C. 425.

[three months from this date," and it appeared there was a bill of exchange dated 25 October and agreeing in all other respects with the description of the bill referred to in the agreement; it was held that the bill was sufficiently identified in the agreement. (z)]

Where the parties themselves subsequently alter the agreement so as to make it conform with their original intention, extrinsic evidence is admissible to explain the alteration and to show that the agreement as originally framed did not accord with the real agreement.

The strict rule of law is largely tempered by the doctrines and practice of the courts of equity; for a court of equity will not enforce a contract which has been drawn up by mistake in terms not in conformity with the real agreement of the parties; and will in some cases reform or set aside the mistaken agreement.

The defence that the contract sought to be enforced is not in conformity with the real agreement, but has been drawn up incorrectly by mistake, may be set up in answer to a bill for specific performance. (a) In such case, if the plaintiff will not accept specific performance with the variation in the agreement set up and proved by the defendant, his bill is dismissed; but if he is willing to adopt the variation, he may have a decree; (b) and specific performance of the agreement with the variations proved, may be decreed at the instance of the defendant without a cross-bill. (c)

Upon sufficient proof of the mistake and of the agreement really made, a court of equity exercises a jurisdiction to rectify the contract, and to enforce it in its corrected state. (d) In the exercise of this jurisdiction a court of equity necessarily receives evidence

(z) *Way v. Hearne*, 13 C. B. N. S. 292; 199; *Best v. Stow*, 2 Sandf. Ch. 298; 32 L. J. C. P. 34.

(a) *Joynes v. Statham*, 3 Atk. 388; *Bradbury v. White*, 4 Greenl. 391; *Lucas v. Mitchell*, 3 A. K. Marsh. 246; *Brooks v. Wheelock*, 11 Pick. 439.

(b) *Clark v. Grant*, 14 Ves. 519; *Ramsbottom v. Gosden*, 1 V. & B. 165; *London & Birmingham Ry. Co. v. Winter, Cr. & Ph.* 57; *Martin v. Pycroft*, 2 De G., M. & G. 785 (Am. ed.), note (3), 22 L. J. C. 94; 1 Sugden V. & P. (8th Am. ed.) 160, 161; *Miller v. Chetwood*, 1 Green Ch. 199; *Cathcart v. Robinson*, 5 Peters, 262; *Oliver v. Palmer*, 11 Gill & J. 426.

(c) *Fife v. Clayton*, 13 Ves. 546; 1 Sugden V. & P. (8th Am. ed.) 232, and note (i); 1 Dan. Ch. Pr. (4th Am. ed.), 385; *See Henkler v. Royal Exchange Ass. Co.* 1 Ves. sen. 317; *Baker v. Paine*, 1 Ves. sen. 456; *Motteux v. London Ass. Co.* 1 Atk. 545; 1 Sugden V. & P. (8th Am. ed.) 160, note (r).

Rules of equity as to agreements containing a mistake.

[of the real agreement in variation of the terms of the written agreement. (*e*)

“In the ordinary case of rectifying mistakes in an instrument where it is sought to alter the instrument in any prescribed or definite mode, the mistake must be the concurrent mistake of all the parties. (*f*) In such cases it is necessary to prove not only that there has been a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really so intended; for in such a case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument.” (*g*)

Where a document has been signed as an agreement in a common mistake as to its contents, and it appears that no real agreement was come to between the parties according to which it might be rectified, the court will set it aside. (*h*) An agreement for a lease was drawn up and signed, stating two different sums for the rent in different parts of the agreement, the larger sum being that previously settled and intended to be inserted; afterwards the lease was drawn up as agreed; but stated the smaller sum as the rent, and was executed by the lessor in ignorance of the mistake, and by the lessee with knowledge of it; it was held that the lease could not be rectified against the lessee, because the agreement for the lease contained contradictory statements, as to the amount of the rent, but that the lessee should have an option to take a corrected lease, or to give up the one executed, paying for the use and occupation of the premises up to that time at the higher rent. (*i*)

Where the contract is within the statute of frauds, the real agreement cannot, in general, be proved without satisfying the requirements of that statute; (*j*) but it has been held to be no objection to a claim for specific performance of a written contract,

(*e*) *Ball v. Storie*, 1 Sim. & Stu. 210, 219.

(*f*) 1 Sugden V. & P. (8th Am. ed.) 160, n. (*r*); *ante*, 1024, and cases cited in note (*h*).

(*g*) *Per Turner L. J. Bentley v. Mackay*, 31 L. J. C. 697, 709; *per Romilly M. R. Murray v. Parker*, 19 Beav. 305, 308.

(*h*) *Ib.*; *Calverley v. Williams*, 1 Ves. jun. 210; *Price v. Ley*, 32 L. J. C. 530; *Fowler v. Scottish Life Ass. Co.* 28 L. J. C. 225.

(*i*) *Garrard v. Frankel*, 30 Beav. 445; 31 L. J. C. 604.

(*j*) *See Att. Gen. v. Sitwell*, 1 You. & Coll. Ex. 559, 583; *Rich v. Jackson*, 4 Bro. C. C. 514; 6 Ves. 334 (37); *Woollam v. Hearn*, 7 Ves. 211; 1 Sugden V. & P. (8th Am. ed.) 160, note (*r*); *Glass v. Hulbert*, 102 Mass. 24; *Moale v. Buchanan*, 11 Gill & J. 314; *Smith v. Machin*, 4 Lansing, 41, 45, 46; *Fisher v. Deibert*, 54 Penn. St. 460.

[that a provision was verbally agreed to which was not inserted in the writing, if the plaintiff will consent to the performance of the omitted term. (*k*)

Where the agreement is induced by a mistake common to both parties, without which mistake the agreement would not have been made, the question arises whether the agreement is made absolutely, or only conditionally upon and with reference to the state of circumstances supposed by mistake, so that upon the real state of circumstances the agreement is inoperative and void.

Mistake of both parties in matter inducing the agreement.

A contract was made for the sale of a cargo, then supposed to be on board a ship on its voyage, but which, unknown to both parties, had ceased to exist at the time of the sale; it was held that the contract imported the condition that the cargo was in existence, and that, this not being the case, the contract was void, and the vendor could not recover the price from the purchaser. (*l*) A contract of sale of an annuity during the life of a person was held to be conditional upon the annuitant being alive at the time of the sale; so that, he having previously died, and the purchase-money having been paid in ignorance of that fact, it was held that the sale was void, and that the purchaser was entitled to recover back his money. (*m*) A policy of insurance was renewed during the days of grace allowed after the expiration of the policy by the payment and acceptance of the premium, both parties being ignorant that the life insured had previously died during the days of grace; it was held that the renewal, being conditional upon the insured being then alive, was void (*n*), and that the insurer might recover back the premium as having been paid under a mistake of fact. (*o*)

An agreement was made for the sale of a remainder in fee expectant on an estate tail, and an absolute bond was given to secure the purchase-money; at the time of the sale the tenant in tail had

(*k*) *Martin v. Pycroft*, 2 De G., M. & G. 785 (Am. ed.), note (3); 22 L. J. C. 94; and see *Fry on Specific Performance*, § 519-535.

(*l*) *Couturier v. Hastie*, 9 Ex. 102; 5 H. L. C. 673; 25 L. J. Ex. 253; 1 Sugden V. & P. (8th Am. ed.) 247, and note (*c*¹); *Hitchcock v. Giddings*, 4 Price, 135; *Allen v. Hammond*, 11 Peters, 63; *Thompson v. Gould*, 20 Pick. 139, per Wilde J.

(*n*) *Pritchard v. Merchants' Life Insurance Soc.* 3 C. B. N. S. 622; 27 L. J. C. P. 169.

(*o*) Per Byles J. *Ib.*

[suffered a recovery and destroyed the remainder, of which both parties were ignorant; a court of equity held the agreement void and cancelled the bond, upon the ground that the parties had contracted upon the supposition that a recovery had not then been suffered. (*p*) An agreement was made between the assignee of the tenant for life of an estate and the person entitled in remainder respecting the timber on the estate, under the supposition that the tenant for life was then alive and entitled to cut the timber, but in fact he was then dead; it was held that the agreement was void both in equity and at law. (*q*)

The plaintiff contracted with the defendant for the purchase of an estate, which was supposed by both the parties, and was described in the agreement to contain 21,750 acres, but in fact contained only 11,814; it was held that the contract could not be enforced on either side. (*r*) So, where a contract was made for the sale of a manor described as embracing a particular parish, and supposed by both parties to do so, and it was subsequently discovered that it included waste lands beyond the parish which neither party contemplated to be within the subject of the purchase, the court held that the contract could not be enforced in a manner to include those lands. (*s*) So, an agreement for the sale of shares in a company, made in ignorance that a petition for winding up the company had been presented, was held not to be enforceable, so as to make the purchaser a contributory. (*t*)

But the contract may be unconditional, although the parties are under a mistake respecting some matter which induces the contract. Thus, the defendant by deed sold and assigned a ship to the plaintiff, and covenanted that he then had power to sell the ship; the plaintiff sued the defendant for a breach of this covenant, and it appeared that the ship was a wreck at the time of the sale, of which both parties were ignorant; the court held that the contract was absolute, and if the ship had ceased to exist as a ship at the time of the sale the covenant was broken, but if it then still existed as a ship, however damaged, there was no breach, as the covenant imported no obligation with respect to the condition of the ship. (*u*)

(*p*) *Hitchcock v. Giddings*, 4 Price, 135. Col. Ex. 620; *Davis v. Shepherd*, L. R. 1

(*q*) *Cochrane v. Willis*, 35 L. J. C. 36; Ch. Ap. 410.

L. R. 1 Ch. Ap. 58.

(*s*) *Baxendale v. Seale*, 19 Beav. 601.

(*r*) *Earl of Durham v. Legard*, 34 L. J.

(*t*) *Emmerson's case*, L. R. 1 Ch. Ap.

C. 589; and see *Price v. North*, 2 You. &

433.

(*u*) *Barr v. Gibson*, 3 M. & W. 390.

[Upon the sale of a specific lease of premises which both parties supposed to be for a certain term, but which was afterwards discovered to be for a longer term and of greater value, it was held that there was no mistake as to the substance of the thing sold, and a court of equity refused, after a lapse of time, to give any relief to the vendor. (*v*)

It seems that a common mistake of a matter of law inducing an agreement would modify its effect in equity, as applied to the true state of the law, upon the same principle as a common mistake upon a matter of fact; and that a court of equity would grant relief against an agreement made under such circumstances. (*w*)

Where an agreement is capable of being applied to different things or in different ways, and is accepted by each party with a different application, there is no real agreement between them, and consequently no contract. It is not competent to a party to an agreement to assert an application of the agreement inconsistent with the terms agreed upon as expressing the common intention; but he is at liberty to show that it was understood by him to apply in a manner consistent with its terms, but different from the application accepted by the other party.

In such cases the agreement is said to contain a latent ambiguity, or one which appears only in the course of applying it. "A latent ambiguity is where it is shown that words apply equally to two different things or subject-matters; and then evidence is admissible to show which of them was the thing or subject-matter intended." (*x*)

What is called a patent ambiguity, that is, a doubt or uncertainty appearing in the terms of the agreement as expressed by the parties themselves, cannot be altered or explained by extrinsic evidence; and if it is incapable of a rational interpretation, the agreement, at least to the extent of the ambiguity, is necessarily void. (*y*)

(*v*) *Okill v. Whittaker*, 1 De G. & Sm. Godfrey, 5 De G., M. & G. 76; 23 L. J. C. 83; 2 Phil. 338, see the passages from the Digest cited by V. C. Knight Bruce in 769; Story Eq. Jur. § 125-138.

(*x*) Per Alderson B. *Smith v. Jeffries*. 15 M. & W. 561, 562; 1 Sugden V. & P. (8th Am. ed.) 169, and notes.

(*w*) *Re Saxon Life Assurance Soc.* 2 J. & H. 408; 32 L. J. C. 206; and *Stone v.* (y) See *Coles v. Hulme*, 8 B. & C. 568;

[A contract was made for the sale by the plaintiff to the defendant of a cargo of cotton "to arrive ex *Peerless* from Bombay," and it appeared that there were two ships named *Peerless* then sailing from Bombay, and the plaintiff meant one and the defendant meant the other; it was held that there was no contract; and in an action for not accepting the cargo of cotton by the one ship *Peerless*, a plea that the defendant meant another ship *Peerless*, and that the plaintiff was not ready to deliver cotton from that *Peerless*, was held a good plea. (z)]

Upon a sale of land by auction the particulars and conditions of sale were so worded that it was doubtful whether the timber on certain lots was included in the price of the lot, or was to be valued separately, the plaintiff asserting the one construction and the defendant the other; specific performance in either view was refused, upon the ground that "if the one intended to sell upon one set of terms as he conceived them, and the other intend to buy according to a different set of terms, there was in reality no agreement between them." (a)

Since the admission of pleadings upon equitable grounds in actions at law under the C. L. P. Act, 1854, s. 83-86, a mistake in an agreement may in some cases be set up in an action at law. The courts of law allow pleadings upon equitable grounds only where by the judgment at law they can do complete and final justice, and settle all the equities between the parties; and, therefore, having no jurisdiction to pronounce conditional judgments, or to impose or enforce special terms upon the parties, they allow pleadings upon equitable grounds only where a court of equity upon the same circumstances would decree an absolute, unconditional, and perpetual injunction to stay the proceedings at law. (b)

Mistake as matter for pleadings at law upon equitable grounds.

Hence, a mistake in an agreement, of the kind in which the relief in equity would be by reforming the agreement, cannot be relied on as ground for an equitable pleading; because the court of

Alder v. Boyle, 4 C. B. 635; 1 Sugden V. & P. (8th Am. ed.) 169, and note (t).

(z) Raffles v. Wichelhaus, 2 H. & C. 906; 33 L. J. Ex. 160.

(a) Higginson v. Clowes, 15 Ves. 516; Clowes v. Higginson, 1 Ves. & Beav. 524; and see Neap v. Abbott, Coop. 333; Bax-

endale v. Seale, 19 Beav. 601; 1 Sugden V. & P. (8th Am. ed.) 314; Spurr v. Benedict, 99 Mass. 463; Kyle v. Kavanagh, 103 Mass. 356.

(b) See Bullen & Leake Prec. Pl. 2d ed. 486.

[law cannot apply the proper remedy. (*c*) Accordingly, a plea on equitable grounds that the defendant accepted a bill under a mistake as to the date, was not allowed; (*d*) and a replication on equitable grounds, that a release by deed was executed in mistake of its legal effect, was held bad on demurrer. (*e*)

But where a contract containing a mistake in its terms has been completely executed according to the terms intended by the parties, so that no object remains to be served by reforming the contract, the mistake may be relied upon as matter for an equitable pleading in answer to the contract, if alleged according to the written terms. (*f*) So also, where it would be useless to reform the contract according to the terms intended by reason of lapse of time or other circumstances having rendered a further performance of it impracticable, the mistake may form an absolute and conclusive answer to the contract in an equitable pleading. (*g*)

Where the mistake is of that kind that equity would grant an absolute injunction, it affords a complete answer to an action on the contract, and is a sufficient ground for an equitable pleading. Thus, an equitable plea to an action on a contract that the defendant was intended by both parties to sign it only as agent in order to bind his principal, and that he signed it in a manner to make himself personally liable by mistake, was held to be a good plea. (*h*) So, a replication on equitable grounds to a plea of a release, that the release was worded to include the claim sued for by a mistake, was held good. (*i*) In an action on a deed of dissolution of partnership in a business, for a breach of covenant in practising the business in a certain district, a plea upon equitable grounds, that the covenant was worded by mistake and contrary to the intention of the parties so as to include the district in which the breach of covenant was charged, was allowed, as showing grounds for a perpetual injunction against the action.] (*j*)

(*c*) *Perez v. Oleaga*, 11 Ex. 506; 25 L. J. Ex. 65; *Solvency Mutual Guarantee Co. v. Freeman*, 7 H. & N. 17; 31 L. J. Ex. 197.

(*d*) *Drain v. Harvey*, 17 C. B. 257; 25 L. J. C. P. 81.

(*e*) *Teed v. Johnson*, 11 Ex. 840; 25 L. J. Ex. 110.

(*f*) *Steele v. Haddock*, 10 Ex. 643; *Vorley v. Barrett*, 1 C. B. N. S. 225; 26 L. J. C. P. 1.

(*g*) *Borrowman v. Rossel*, 16 C. B. N. S. 58; 33 L. J. C. P. 111.

(*h*) *Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 Ib. 451.

(*i*) *Lyall v. Edwards*, 6 H. & N. 337; 30 L. J. Ex. 193.

(*j*) *Luce v. Izod*, 1 H. & N. 245; 25 L. J. Ex. 307.

2. Fraud.

1. Fraud renders a contract voidable *ab initio*, both at law and in equity, whether such fraud were committed by one of the contracting parties upon the other; or by both upon persons not parties thereto; for the law will not sanction dishonest views and practices, by enabling an individual to acquire any right or interest by means thereof. (*d*)

Effect of
fraud in gen-
eral.

Thus, a man may avoid a deed or other instrument, which he was induced to execute by a fraudulent misrepresentation of its contents. (*e*)

Deeds.

And where the defendant's signature to a bill of exchange, was obtained by a fraudulent misrepresentation that he was signing a guaranty, and in the *bonâ fide* belief on his part that this was the fact; it was held that he could set up this, as a defence to an action on the bill by an innocent holder for value. (*f*)

Bills of ex-
change.

But where a man puts his name to a bill or note, intending thereby to become a party thereto, a person whose own title to the bill or note is defeasible on the ground of fraud, may still confer a title thereto on an innocent third party; and such party may, in his turn, confer a title to the bill or note even on one who has notice of the original fraud, provided he was no party to such fraud. (*g*)

(*d*) See *Fermor's case*, 3 Co. 77; per Lord Mansfield *C. J. Bright v. Eynon*, 1 Burr. 390; and *Foxcraft v. Devonshire*, 1 Bl. 193. See 1 Fonbl. Tr. Eq. 6th ed. 122, and notes; *Boulton v. Bull*, 2 Bl. 465; *Willis v. Baldwin*, 2 Dougl. 450; 3 V. & B. 42; *Haigh v. De la Cour*, 3 Camp. 319. [See *Duncan v. M'Cullough*, 4 Serg. & R. 483; *Dingley v. Robinson*, 5 Greenl. 127. The fraud must be in a point material to the contract, but it is immaterial whether it relates to the consideration, or the execution of the contract. The rule is the same whether the contract is by parol, or is under seal; the seal makes no difference. *Hoitt v. Holcomb*, 23 N. H. 535.] When concealment of a material fact avoids a release, *Bowles v. Steward*, 1 Sch. & Lef. 209. [But, although a contract may be avoided on the ground of fraud as between the parties, still the rights

of third parties acquired through a contract induced by fraud, before avoidance of the contract, and without participation in or notice of the fraud, cannot be affected by a subsequent avoidance. *White v. Garden*, 10 C. B. 919; *Kingsford v. Merry*, 11 Exch. 577, 579; *ante*, 566, and note (*e*).]

(*e*) *Com. Dig. Fait (B. 2)*; per Bayley *B. Edwards v. Brown*, 1 C. & Jer. 307; [*Rawlins v. Wickham*, 3 De G. & J. 304, and note (2); *Nicol's case*, 3 De G. & J. 387.]

(*f*) *Foster v. Mackinnon*, L. R. 4 C. P. 704.

(*g*) *Masters v. Ibberson*, 8 C. B. 100; 18 L. J. C. P. 348; and see *Marston v. Allen*, 8 M. & W. 494; *Barber v. Richards*, 6 Exch. 63; *May v. Chapman*, 16 M. & W. 355, 360.

And the fraud of an authorized agent will render voidable a contract made by him for his principal. (*h*) But there appears to be a difference between a misrepresentation made by an agent, which is collateral to the contract, and one which is embodied in the contract,—it being necessary, in the former case, to bring home the fraud to the principal, by showing either that he authorized the misrepresentation of his agent, or that he afterwards assented thereto; (*i*) whilst, in the latter case, the fraud of the agent will render the contract voidable as against the principal, without its being shown that he was privy to it. (*k*)

But a court of equity will not rescind a contract on the ground of fraud, without the clearest proof of such fraud; nor unless it appear that the contract was based on the misrepresentations complained of; (*l*) nor where the party

Fraud of agent.
When a contract may be rescinded for fraud.

(*h*) Per Lord Campbell, *Wilde v. Gibson*, 1 H. L. C. 605, 615; per Willes J. delivering the judgment of the exchequer chamber, *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 265. And see *Udell v. Atherton*, 7 H. & N. 172; *Hern v. Nichols*, 1 Salk. 289; *Fitzherbert v. Mather*, 1 T. R. 12; *Doe v. Martin*, 4 Ib. 39; *Richardson v. Mellish*, 2 Bing. 243; *Everett v. Desborough*, 5 Bing. 503; *Bardell v. Spinks*, 2 C. & K. 646; *Taylor v. Green*, 8 C. & P. 316; [1 *Sugden V. & P.* (8th Am. ed.) 2, and note (*g*); *Bennet v. Judson*, 21 N. Y. 238; *Fitzsimmons v. Joslyn*, 21 Vt. 129, 140–142; *Bowers v. Johnson*, 10 Sm. & N. 169; *New Brunswick &c. Co. v. Conybeare*, 1 De G., F. & J. 578; *S. C.* 9 H. L. C. 711; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Nicol's case*, 3 De G. & J. 387; *Kerr F. & M.* (1st Am. ed.) 111–113; *Elwell v. Chamberlain*, 31 N. Y. 611; *Mundorf v. Wickersham*, 63 Penn. St. 87.] Bond of indemnity to a sheriff, obtained by the fraud of his officer, is void. *Raphael v. Goodman*, 8 A. & E. 565. [Where a sale made by an agent is ratified by his principal, the agent's fraudulent acts or representations made at the time of the sale, bind his principal. *Doggett v. Emerson*, 3 Story, 700; *S. C.* 1 Woodb. & M. 195; *Veazie v. Williams*, 8 How. (U. S.) 134; *ante*, 281, note (*l*), 291, and note (*n*); *Grant v. Beard*,

50 N. H. 129; *Brower v. Lewis*, 19 Barb. 574; *Kerr F. & M.* (1st Am. ed.) 112, 113; *Kibbe v. Hamilton Mutual Fire Ins. Co.* 11 Gray, 163; *Woodbury J. in Ferson v. Sanger*, 1 Woodb. & M. 147; *Brooke v. Berry*, 2 Gill, 83; 1 *Sugden V. & P.* (8th Am. ed.) 250, note (*q*).]

(*i*) *Cornfoot v. Fowke*, 6 M. & W. 358, 370; *Wright v. Crookes*, 1 Scott N. R. 685; [1 *Sugden V. & P.* (8th Am. ed.) 2, and note (*g*), 250.]

(*k*) *Cornfoot v. Fowke*, 6 M. & W. 358; and see *Watson v. Earl of Charlemont*, 12 Q. B. 856; 18 L. J. Q. B. 65; [1 *Sugden V. & P.* (8th Am. ed.) 250, note (*q*), and cases cited; *Bartlett v. Salmon*, 6 De G., M. & G. (Am. ed.) 39, 40; *National Exchange Ins. Co. v. Drew*, 2 Macq. 103; *Attwood v. Small*, 6 Cl. & Fin. 232, 448; *Wheelton v. Hardisty*, 8 El. & Bl. 232, 260.]

(*l*) *Attwood v. Small*, 6 C. & F. 232; [Jennings v. Broughton, 6 De G., M. & G. 126; *Lowndes v. Lane*, 2 Cox, 363; *Mason v. Crosby*, 1 Woodb. & M. 342; *Barrett's case*, 3 De G., J. & S. 30; *Vigers v. Pike*, 8 Cl. & Fin. 562, 650; *Pulsford v. Richards*, 17 Beav. 87, 96; *National Exchange Ins. Co. v. Drew*, 2 Macq. 103, 120; *Canham v. Barry*, 15 C. B. 597; *Way v. Hearn*, 11 C. B. N. S. 774; *Clapham v. Shillito*, 7 Beav. 146. But it is not necessary that the representation

seeking relief, is not able to put those against whom it is sought, into the same situation in which they stood when the contract was entered into. (*m*)

So if a party, with knowledge of all the facts, voluntarily act on a contract which is voidable on the ground of fraud, a court of equity will not afterwards rescind it at his instance. (*n*) And where a joint stock company sued a shareholder for calls, and the defendant pleaded that he was induced to become a shareholder by the fraud of the plaintiffs; this plea was held ill, because it did not show that the defendant had, on discovering the fraud, avoided the contract by which he became shareholder. (*o*)

And it is not competent to the person who was guilty of the fraud, to avoid the contract on the ground thereof; (*p*) so that, where a contract is fraudulent, it may be valid as between the parties thereto, although void in so far as it affects the rights of others. Thus, where a man has executed a bill of sale of his goods, it is not competent to either of the parties thereto to impeach it, on the ground that it was given to defeat the claims of creditors. (*q*)

Who may take advantage of.

should have been the sole inducement to the contract. *Shaw v. Stine*, 8 Bosw. 157; *Kerr F. & M.* (1st Am. ed.) 74, 75; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Smith v. Kay*, 7 H. L. 750, 775; *Rawlins v. Wickham*, 3 De G. & J. 304; *Traill v. Baring*, 33 L. J. Ch. 521, 527; *Reynell v. Sprye*, 1 De G., M. & G. 660.]

(*m*) Per Lord Cranworth, *Western Bank of Scotland v. Addie*, L. R. 1 Scotch Ap. 145, 164; [*Mixer's case*, 4 De G. & J. 586; *Clarke v. Dickson*, E., B. & E. 148; *Rawlins v. Wickham*, 3 De G. & J. 322; *Oakes v. Turquand*, L. R. 2 H. L. 346; *Kerr F. & M.* (1st Am. ed.) 48, 49; *Scholefield v. Templer*, 4 De G. & J. 429; *White v. Garden*, 10 C. B. 919.]

(*n*) See *Ormes v. Beadel*, 30 L. J. C. 1; [*S. C.* 2 De G., F. & J. 336; *Kerr F. & M.* (1st Am. ed.) 299.]

(*o*) *Deposit Life Assurance v. Ayscough*, 6 E. & B. 761; and see *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324; [*Campbell v. Fleming*, 1 Ad. & El. 40; *Selway v. Fogg*, 5 M. & W. 83; *Macbryde v. Weekes*, 22 Beav. 533; *Vigers v.*

Pike, 8 Cl. & Fin. 562; *Clarke v. Dickson*, E., B. & E. 148.]

(*p*) Per Lord Tenterden, *Jones v. Yates*, 9 B. & C. 532, 538; and see *Doe d. Roberts v. Roberts*, 2 B. & Al. 367; *Philpotts v. Philpotts*, 10 C. B. 85; [*White v. Hunter*, 23 N. H. 128; *Taylor v. Weld*, 5 Mass. 116; *Ayers v. Hewett*, 19 Maine, 281. But when it is material for a party to a suit to show, that a contract between himself and the other party has been annulled, he is not estopped to do so, though in proving it he is obliged to show that the contract was abrogated in consequence of his own fraudulent act. A party in such a case is not estopped to prove a just defence, because his evidence tends to show him guilty of a fraud in relation to a matter on which his defence does not rest. *Woods v. Kirk*, 28 N. H. 324.]

(*q*) *Bessy v. Windham*, 6 Q. B. 166 and see *Deady v. Harrison*, 1 Stark. 60; *Robinson v. M'Donnell*, 2 B. & Ald. 134; *Hawes v. Leader*, Cro. Jac. 270; *Yelv.* 196. [A fraudulent conveyance to defeat creditors is good as between the parties

So the obligor of a bond cannot, at law, defend an action thereon, on the ground that the obligee has been guilty of a fraud on a person not a party thereto ; although such fraud might avoid the bond in equity, or render the obligee a trustee for the party defrauded. (*r*)

But where one only of the parties to a contract has been guilty of fraud, such fraud may, in some cases, be taken advantage of, as against him, by a person who was no party to the contract. Thus, where the defendant sold a gun to the plaintiff's father, *for the use of himself and his sons*, and fraudulently warranted the gun ; and one of the sons, the plaintiff, confiding in the warranty, used the gun, whereupon it burst and injured him ; it was held, that the plaintiff might sue the defendant for the deceit. (*s*)

So, where the declaration alleged, that the defendant and certain others had formed a company ; that the defendant, being a promoter and managing director thereof, intending to *defraud the public*, fraudulently caused it to be *publicly advertised*, that the said company was likely to be a safe and profitable undertaking ; that the defendant, by means of the said false and fraudulent representations, induced the plaintiff to become the purchaser of certain shares in the said company ; and that by means thereof the plaintiff lost the money paid for such shares ; it was held that it disclosed a good cause of action. (*t*)

So an action may be maintained for a fraudulent misrepresentation, although such representation be not embodied in the agreement between the parties, and cannot be substantiated without the aid of parol evidence. (*u*)

2. Fraud is of various kinds ; but it generally consists either in the *misrepresentation*, or in the *concealment* of a material fact.

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fraud may
consist.

and their representatives. Reichart v. Castator, 5 Binney, 109 ; Dyer v. Homer, 22 Pick. 253 ; Gillespie v. Gillespie, 2 Bibb, 89, 91 ; Sherk v. Endress, 3 Watts & S. 255 ; Jackson v. Garnsey, 16 John. 189 ; Worth v. Northam, 4 Ired. (Law) 102 ; Randall v. Phillips, 3 Mason, 378, 388 ; Dearman v. Radcliffe, 5 Ala. 192 ; Den v. Monjoy, 2 Halsted, 173 ; Thompson v. Moore, 36 Maine, 47 ; Nichols v. Patten, 18 Maine, 231.] (*r*) Horton v. Westminster Improvement Commissioners, 7 Exch. 780, 790. (*s*) Levy v. Langridge (in error), 4 M. & W. 337 ; Langridge v. Levy, 2 M. & W. 519 ; and see Longmeid v. Holliday, 6 Exch. 761 ; Philmore v. Hood, 5 Bing. N. C. 97, and *ante*, 635. (*t*) Gerhard v. Bates, 2 E. & B. 476 ; and see Bedford v. Bagshaw, 4 H. & N. 538. (*u*) Dobell v. Stevens, 3 B. & C. 623.

It is extremely difficult to advance any general principle upon this subject, inasmuch as what does or does not amount to fraud, depends very much on the facts of each particular case, on the relative situation of the parties, and on their means of information. (*v*)

In settling the law on this subject, it has, on the one hand, been the aim of our courts to repress dishonesty; whilst, on the other, they have required that, before relieving a party from a contract on the ground of fraud, it should be made to appear that, in entering into such contract, he exercised a due degree of caution, (*x*) — for, *Vigilantibus et non dormientibus succurrunt jura*. Thus, if there be a patent defect in a manufactured article, and the purchaser has an opportunity of inspecting it, but neglects to do so; he cannot charge the manufacturer with fraud because he did not point out such defect. (*y*) So, if a purchaser, choosing to judge for himself, do not avail himself of the knowledge or means of knowledge open to him, or to his agent, he cannot be heard to say that he was deceived by the vendor's representations, — the rule in such cases being *caveat emptor*; and the knowledge of his agent being as binding on him as his own knowledge. (*z*) So where a person who had

(*v*) [Hanson *v.* Edgerley, 29 N. H. 343. Fraud may be inferred from facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties. Watkins *v.* Stockett, 6 Harr. & J. 435. It is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. Brogden *v.* Walker, 2 Harr. & J. 292; Boreing *v.* Singery, 2 Harr. & J. 455; Singery *v.* The Attorney General, 2 Harr. & J. 487.]

(*x*) See per Tindal C. J. Shrewsbury *v.* Blount, 2 Scott, 588, 594.

(*y*) Horsfall *v.* Thomas, 1 H. & C. 90.

(*z*) Attwood *v.* Small, 6 C. & F. 232; and see Vernon *v.* Keys (in error), 4 Taunt. 488; S. C. 12 East, 632; Cowen *v.* Simpson, 1 Esp. 290; Mason *v.* Ditchbourne, 1 Moo. & Rob. 460, 461; [Hoitt *v.* Holcomb, 32 N. H. 202-205; Vigers *v.* Pike, 8 Cl. & Fin. 650; Veasey *v.* Doton, 3 Allen, 380; Stephens *v.* Orman, 10 Florida, 9; Mooney *v.* Miller, 102 Mass. 220; Brown *v.* Castles, 11 Cush. 348; Prescott *v.* Wright, 4 Gray, 460; Cooper

v. Lovering, 106 Mass. 77, 79; Dickinson *v.* Lee, 106 Mass. 557; Hough *v.* Richardson, 3 Story, 659; Aberaman Iron Works *v.* Wickens, L. R. 5 Eq. 485, 505, 506; S. C., L. R. 4 Ch. Ap. 101; Port *v.* Williams, 6 Ind. 219; 1 Sugden V. & P. (8th Am. ed.) 244; 2 Kent, 484; Warner *v.* Daniels, 1 Woodb. & M. 90, 101, 102; Mason *v.* Crosby, 1 Woodb. & M. 342; Smith *v.* Babcock, 2 Woodb. & M. 246; Tuthill *v.* Babcock, 2 Woodb. & M. 298; Smith *v.* Smith, Penn. Sup. Ct. 1853; 2 Month. Law Mag. January, 1854, p. 56. It seems that a misrepresentation by a horse-dealer in selling a horse, as to the place from whence he received it or bought it, will not constitute a case of fraud to defeat the contract. Geddes *v.* Pennington, 5 Dow, 159. See Taylor *v.* Fleet, 1 Barb. 471, where it is said that, in order to avoid a contract on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have made the contract upon the faith and credit of such representation.

taken shares in a mining company, filed his bill to set aside the contract, on the ground that he had been induced to take the shares, by false representations made by the defendants as to the character and value of the mine; but it appeared that he had been present at the first meeting of the company, that he had visited the mine, and that he had had as full an opportunity as the defendants, of ascertaining the real state and prospects of the mine; the court held that the bill must be dismissed. (a) And where a man

At least he must so far have relied upon it as that he would not have made the purchase, if such representations had not been made. So held, also, in *Phipps v. Buckman*, 30 Penn. St. 402; *Morris Canal Co. v. Everett*, 9 Paige, 168; *Stebbins v. Eddy*, 4 Mason, 414, *ante*, 1036, note (l).

(a) *Jennings v. Broughton*, 22 L. J. C. 585; 17 Beav. 234; affirmed by the lords justices, on appeal, 23 L. J. C. 999; *S. C.* 5 De G., M. & G. 126; [*McDaniel v. Strohecker*, 19 Geo. 432. If the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly, if he neglect to do so, and he is remediless. *Moore v. Turbeville*, 2 Bibb, 602; *Saunders v. Hatterman*, 2 Ired. 32; *Farrar v. Alston*, 1 Dev. 69; *Foley v. Cowgill*, 5 Blackf. 13. Where a carrier brought an action of deceit for a representation that a load was only 8 cwt. when it was 20 cwt., whereby two of his oxen were killed, judgment was given against him because he might have weighed the load himself. *Bailey v. Merrill*, 3 Bulstrode, 94. See *Fields v. Rouse*, 3 Jones Law (N. C.), 72. In this connection, it may be appropriate to refer to the case of *Prescott v. Wright*, 4 Gray, 461, in which it appeared that the owner of a lot of woodland offered to sell all the wood standing thereon at a certain price by the acre, and either have the land measured, or call it seven acres, and at the same time gave the purchaser a week to consider of it; that within the week, it was agreed between the parties, that the purchaser should take it at seven acres, and he thereupon paid a part of the price, and gave his note for the balance, and received a

receipt for the same, specifying the land on which the wood was standing and describing it, and also fixing the time within which the wood was to be removed. Evidence was introduced to show that while the papers were being drawn up, the purchaser, in reply to questions put by the seller, said that he had not fully measured the lot, but he thought it would overrun eight acres a little, when, in fact, after the offer, and before the bargain was closed, the purchaser had caused it to be surveyed, and had ascertained that it contained sixteen acres. Upon this evidence, it was decided, that the jury might find such fraudulent representations by the purchaser, as would authorize the seller to rescind the sale. It is worthy of notice in this case, that the representations made by the purchaser, were in reference to the property of the seller, as to which, it is fair to presume, that the seller had quite as good opportunity for ascertaining the truth of the matters represented as the purchaser had, if not better. It is also worthy of notice, that, if the facts are stated in the report in the natural order of their occurrence, the terms of the bargain had been agreed upon, and the whole or a part of the price had been paid, before any inquiry was put to the purchaser, and before he made any of the representations complained of. Within the code of morals, the conduct of the purchaser was deserving of censure, as disingenuous and unfair in not informing the seller of the true quantity of land in the lot. But as *Porter J.* said, in *Phipps v. Buckman*, 30 Penn. St. 402, "the domain of law differs from that of morals. The one aims to prevent and redress actual wrong; the other to regu-

purchases shares in a company on the faith of the prospectus, and is thereby referred to any document which would show the untruth or inaccuracy of any of the statements contained in such prospectus, but chooses not to make use of his means of knowledge; he cannot afterwards be heard to complain that he has been deceived by the alleged misstatements. (*b*)

But it is said that, when once it is established that there has been a fraudulent misrepresentation or wilful concealment, by which a person has been induced to enter into a contract; it is, in general, no answer to his claim to be relieved from such contract, to say that he might have discovered the truth by proper inquiry. (*c*)

A misrepresentation, not as to the *contents*, (*d*) but as to the *legal effect* of an agreement, does not avoid the same as against a party who has been induced by such misrepresentation to enter into such agreement; for, — every man being supposed to know

late those sentiments of the mind which prompt to outward action. Like concentric circles of unequal circumference, they embrace ground common to both; but there are sound moral maxims which fall beyond the sphere of jurisprudence. Every false statement is an immoral act, but not every false representation will invalidate a contract. An agreement is seldom made in which each party does not hope for some advantage to himself, and do something to obtain it. The seller extols, and the buyer depreciates the value of the commodity. For everything untruly said or done by either, sound morals will hold him to account; but the law allows the avarice of mankind thus to play on its orbit, until, by falsehood, damage has been done. The weight of modern authority preponderates in favor of the principle that an intention to deceive, and a false statement even on a material point, will not overthrow the bargain, unless the statement was the means that produced it.”]

(*b*) Per Lord Chelmsford C. *Hallows v. Fernie*, L. R. 3 Ch. Ap. 467, 477.

(*c*) Per Lord Chelmsford C. *Central Railway Company of Venezuela v. Kisch*, L. R. 2 H. L. 99, 120; and see, per Turner L. J. *Kisch v. Central Railway Company of Venezuela*, 34 L. J. C. 545, 552; [3 De G., J. & S. 122; S. C. L. R. 2 Ch. Ap.

114.] But see *Conybeare v. New Brunswick & Co., Company*, [1 De G., F. & J. 578; S. C.] 29 L. J. C. 435, 455; S. C. (in Dom. Proc.) 9 H. L. C. 711. [A man who has received the positive representations or assurances of another as to a material fact, has a right to rely upon them, and is not bound to make any further inquiry. *Vigers v. Pike*, 8 Cl. & Fin. 562, 650; *Wilson v. Short*, 6 Hare, 366, 375; *Reynell v. Sprye*, 1 De G., M. & G. 710; *Rawlins v. Wickham*, 3 De G. & J. 319; Smith's case, L. R. 2 Ch. Ap. 614; *Boyce v. Grundy*, 3 Peters, 210; *Young v. Harris*, 2 Ala. 103; *Clapton v. Cogart*, 3 Sm. & M. 363; *Bean v. Herrick*, 12 Maine, 262; *Kerr F. & M.* (1st Am. ed.) 79; *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 233, note (2). And it has been held, that a contract for the sale of land may be rescinded in favor of the purchaser for fraud in the sale, although he had an opportunity to examine the land before the purchase, and did examine it, but did not go into details and confided for those in the false statements of the person negotiating with him, and of his agents. *Smith v. Babcock*, 2 Wood. & M. 246; *Tuthill v. Babcock*, 2 Wood. & M. 299; *Mason v. Crosby*, 1 Wood. & M. 342; 1 Story Eq. Jur. § 203 f. in note.]

(*d*) See *ante*, 1035.

the legal effect of an instrument which he executes, — such misrepresentation must be taken to be of a matter within his own knowledge. (*e*)

And if there be no misrepresentation of any existing fact, but only an intention, at the time of the contract, to depart from it, which intention is not alleged to have been carried into effect, that does not vitiate the contract. (*f*) [To have this effect the fraud must work an actual injury. (*f*¹) And no more damages can be recovered, in an action for the injury, than are directly attributable to the fraud.] (*f*²)

But wherever one person misrepresents a material fact — that is, a fact which is substantially the consideration for the contract, — and which is peculiarly within his own knowledge; (*g*) or conceals a material fact which it was his duty to communicate; (*h*) or

(*e*) *Lewis v. Jones*, 4 B. & C. 506, 512; [*Russell v. Brannan*, 8 Blackf. 277.] It would seem, however, that a *failure of consideration* may be shown to have arisen, as well from a misrepresentation of a matter of law, as from a misrepresentation of a matter of fact. *Southall v. Rigg*, 11 C. B. 481; 20 L. J. C. P. 145. But see *Rashdall v. Ford*, L. Rep. 2 Eq. 750.

(*f*) Per Parke B. *Hemingway v. Hamilton*, 4 M. & W. 115, 122.

(*f*¹) [*Vernon v. Keys*, 12 East, 632; *Croke J. in Bailey v. Merrick*, 3 Bulst. 95; *Morgan v. Bliss*, 2 Mass. 112.]

(*f*²) [*Stafford v. Newsom*, 9 Ired. 507; *Corbett v. Brown*, 5 C. & P. 363. A. in a written representation that B. was entitled to credit, concealed the fact that B. was a minor, with a view to give him a credit, knowing or believing that he would not obtain credit if that fact was known; C. sold goods to B. on credit, upon the faith of A.'s representations; B. did not pay for the goods, but left the country and went on a whaling voyage. It was held, that A. was guilty of an actionable fraud, and that C. was entitled to recover of him the value of the goods, without first bringing an action therefor against B. *Kidney v. Stoddard*, 7 Met. 252. In this case, however, it did not appear that B. failed to pay on the ground of his minority, or that the minority had any connection with the dam-

ages, excepting that C. would not have given the credit, if he had known that B. was a minor. In the case above stated, C. would not be confined to his action against A., but the fraud of A. invalidates the sale between C. and B. and gives C. the same rights to reclaim his goods, as if the fraud had been practised by B. himself. *Fitzsimmons v. Joslyn*, 21 Vt. 129.]

(*g*) *Attwood v. Small*, 6 C. & F. 232; per Erle J. *Mallalieu v. Hodgson*, 16 Q. B. 689, 712; per Cur. *Wilson v. Wilson*, 6 Scott, 540, 573; and see *Evans v. Edmonds*, 13 C. B. 777; *Canham v. Barry*, 15 Ib. 597; and per Lord Kenyon, *Geddes v. Pennington*, 5 Dow, 159, 163; [*McAdams v. Cotes*, 24 Mis. (3 Jones) 223; *Rosson v. Hancock*, 3 Sneed (Tenn.), 434; *Prentiss v. Russ*, 16 Maine, 30.] A partner, who superintended exclusively the accounts of the concern, agreed to purchase his copartner's share of the business, for a sum which he knew — from accounts in his possession, but which he concealed from his copartner — was inadequate: the agreement was set aside in equity. *Maddeford v. Austwick*, 1 Sim. 89. [See *Matthews v. Bliss*, 22 Pick. 48; *Paul v. Hadley*, 23 Barb. 521.]

(*h*) Per Bramwell B. *Horsfall v. Thomas*, 1 H. & C. 90, 100; [*Irvine v. Kirkpatrick*, 7 Bell Sc. Ap. 186; *Otis v. Raymond*, 3 Conn. 413; *Van Arsdale v.*

uses a device which is calculated to induce the other party to forego inquiry into a material fact upon which the former has information, although such information be not exclusively within his reach; (*i*) and it is shown that the concealment or other deception, was practised with respect to the particular transaction: (*j*) such transaction will be voidable on the ground of fraud. (*j*¹)

• And where one party has induced another to act on the faith of several representations made to him, any one of which he has made fraudulently; he cannot set up the transaction, by showing that every other representation was truly and honestly made. (*k*)

Howard, 5 Ala. 596; Matthews v. Bliss, 22 Pick. 48; Paddock v. Strobbridge, 29 Vt. 470; 2 Kent, 482; Bruce v. Ruler, 2 M. & R. 3; Sides v. Hilleary, 6 Harr. & J. 86; Nickley v. Thomas, 22 Barb. 652; Hanson v. Edgerly, 29 N. H. 343.]

(*i*) Com. on Contr. 38. Fraud is a cause of nullity of the agreement, when the stratagems practised by one of the parties are such, that it is evident that without such stratagems the other party would not have contracted. Code Civil, book 3, tit. 3, art. 1116. *Semble*, that the concealment of a matter which may disable a party from performing the contract is a fraud; per Littledale J. Rex v. Inhabitants of Taunton, St. James, 9 B. & C. 387. [*Fraudulent trade-marks*. If one manufacturer makes use of the trade-marks or descriptions of another manufacturer, with a view of deceiving purchasers, and passing off the articles made by him as articles made by the party whose trade-mark he uses, this is a gross fraud, which prevents him from recovering the price, and subjects him, moreover, to an action for damages at the suit of the party whose trade-mark or name he has used. Southern v. How, Popham, 144; S. C. Cro. Jac. 471; Rodgers v. Nowill, 5 C. B. 109. See, further, as to trade-marks, Edelsten v. Edelsten, 1 De G., J. & S. (Am. ed.) 185, and cases in notes; Burgess v. Burgess, 3 De G., M. & G. (Am. ed.) 896, and cases in note (1); Rodgers v. Nowill, 3 De G., M. & G. 614, 618, note (1); Farina v. Silverlock, 6 De G., M. & G. 214; S. C. 1 De G. & J. 434; Bradley v. Norton, 33 Conn. 157;

2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649, and cases cited in notes (1), (2), and (3); Kerr Inj. 474 *et seq.*; 1 Joyce Inj. 311 *et seq.*; Emerson v. Badger, 101 Mass. 82.]

(*j*) Per Tindal C. J. Green v. Gosden, 3 M. & G. 446, 450. But a contract for the sale of fixtures in a public-house, has been held to be avoided by a misrepresentation as to the amount of business done at the house, although the contract excluded the good-will. Hutchinson v. Morley, 7 Scott, 341.

(*j*¹) [See Beach v. Sheldon, 14 Barb. 66; Gough v. Dennis, Hill & Denio, 55; Gough v. St. John, 16 Wend. 651; Howard v. Gould, 28 Vt. 523; Prentiss v. Russ, 16 Maine, 30; Smith v. Richards, 13 Peters, 26; Doggett v. Emerson, 3 Story, 733; Hough v. Richardson, 3 Story, 691; Daniel v. Mitchell, 1 Story, 172. Where, in consequence of the misrepresentations of the vendor of property, the purchaser has a right to rescind the contract of sale, and does rescind it and surrender possession of the property to the vendor, and he takes possession thereof, the law implies a promise on the part of the vendor, to pay the purchaser for labor and materials in making reasonable repairs and improvements upon the property, of which the vendor has the benefit. Farris v. Ware, 60 Maine, 482. See Canada v. Canada, 6 Cush. 15; Wright v. Haskell, 45 Maine, 489.]

(*k*) Per Cranworth L. J. Reynell v. Sprye, 21 L. J. C. 633, 660; [1 De G., M. & G. 660. See Addington v. Allen, 11 Wend. 375; S. C. 7 Ib. 9; Young v. Hall, 4 Geo. 95.]

It would now, however, appear to be settled, notwithstanding some decisions to the contrary, (*l*) that legal without moral fraud, — that is, that a statement false in fact, but not so to the knowledge of the party making it, and not made with intent to deceive, — will not in general invalidate a contract. (*m*) But if a party, for a fraudulent purpose, state a fact which is untrue, and, without knowing it to be untrue, he does not at the time believe it to be true, this is both a legal and a moral fraud. (*n*)

And it is said that the principle of equity, — which declares that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid that contract, — applies, not merely to cases where the statements were known to be false by those who made them; but to cases where statements were made by persons who believed them to be true, if, in fact, they were untrue. (*o*)

(*l*) Per Lord Abinger, *Cornfoot v. Fowke*, 6 M. & W. 338, 375; *Fuller v. Wilson*, 3 Q. B. 58; *Evans v. Collins*, 5 Q. B. 804. [See, also, *Buford v. Caldwell*, 3 Missou. 477; *Snyder v. Findley*, Coxe, 48; *Thomas v. McCann*, 4 B. Mon. 601; *Lockridge v. Foster*, 4 Scam. 570; *Parham v. Randolph*, 4 How. (Miss.) 435; *Craig v. Blow*, 3 Stewart, 448; *Van Arsdale v. Howard*, 5 Ala. 596; *Munroe v. Pritchett*, 16 Ala. 785.]

(*m*) Per Parke B. *Thom v. Bigland*, 8 Exch. 724, 731; *Moens v. Heyworth*, 10 M. & W. 147; *Taylor v. Ashton*, 11 M. & W. 401; *Collins v. Evans* (in error), 5 Q. B. 820; *Rawlings v. Bell*, 1 C. B. 951; *Ormrod v. Huth*, 14 M. & W. 651; [*Stone v. Denny*, 4 Met. 151; *Hanson v. Edgerly*, 29 N. H. 343; *Page v. Bent*, 2 Met. 371; *Tryon v. Whitmarsh*, 1 Met. 1; *Russell v. Clark*, 7 Cranch, 69; *Young v. Covell*, 8 John. 25; *Boyd v. Browne*, 6 Barr, 316; *Lord v. Goddard*, 13 How. (U. S.) 196; *Weeks v. Burton*, 7 Vt. 67; [and see *Benham v. United Guarantee Company*, 7 Ex. 744; *Barley v. Walford*, 9 Q. B. 197, 208; *Freeman v. Baker*, 5 B. & Ad. 797. See *Flinn v. Tobin*, Moo. & M. 367; *Early v. Garrett*, 9 B. & C. 928; *Polhill v. Walter*, 3 B. & Ad. 114.

(*n*) Per Cur. *Taylor v. Ashton*, 11 M. & W. 401, 415; and see per Maule J. *Evans v. Edmonds*, 13 C. B. 777, 786; per Lord Cairns, *Reese River Silver Mining Company v. Smith*, L. R. 4 H. L. 64, 79; [*Howard v. Gould*, 28 Vt. 523, 526; *Denton v. Great Northern Railway Co.* 5 El. & Bl. 860. Statements, known by the vendor to be false, which induce the vendee to make a purchase to his injury, may fairly be presumed to have been made to induce the purchase. *Collins v. Dennison*, 12 Met. 594. See *Barley v. Walford*, 9 Q. B. 197; *Boyd v. Browne*, 9 Barr, 310.]

(*o*) Per Malins V. C. *Leather v. Simpson*, L. R. 11 Eq. 398, 406; per Romilly M. R. *Pulsford v. Richards*, 22 L. J. C. 559, 562; and see *Rawlins v. Wickham*, 28 L. J. C. 188. But in *Pulsford v. Richards*, the above proposition, — so far as regards statements false in fact, which are made by persons who believed them to be true, — is qualified thus, namely, if such persons in the due discharge of their duty ought to have known, or if they had formerly known, and might have remembered the fact, which negatived the representation made.

On the other hand, where the representation expressly or impliedly forms part of the contract between the parties, it is not essential, in order to render such contract invalid, that there should have been *moral* fraud in making such representation. (p) Thus, in the case of *insurances*,

Rule where representation forms part of the contract.

(p) Per Parke B. Moens v. Heyworth, 10 M. & W. 147, 157; 2 Smith L. C. 71 b;] [Doggett v. Emerson, 3 Story, 700; Daniel v. Mitchell, 1 Story, 172; Lewis v. M'Lemore, 10 Yerger, 206; Warner v. Daniels, 1 Woodb. & M. 107, 108. The subject of fraud, misrepresentation, and mistake in contracts, was very fully considered by Mr. Justice Story, in Daniel v. Mitchell, 1 Story, 172; and Doggett v. Emerson, 3 Story, 700; and by Mr. Justice Woodbury, in Warner v. Daniels, 1 Woodb. & M. 107, 108; Mason v. Crosby, 1 Woodb. & M. 342; Smith v. Babcock, 2 Ib. 246; Tuthill v. Babcock, Ib. 298; and by Mr. Justice Shepley, in Hammatt v. Emerson, 27 Maine, 308. If upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge to be true, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not. Hazard v. Irwin, 18 Pick. 95; Stone v. Denny, 4 Met. 151; Hammatt v. Emerson, 27 Maine, 308. See, also, Doggett v. Emerson, 3 Story, 733; Hough v. Richardson, 3 Story, 691; Daniel v. Mitchell, 1 Story 172; Mitchell v. Zimmerman, 4 Texas, 75; 1 Sugden V. & P. (8th Am. ed.) 4, 5, and note (f). The phrase, "legal without moral fraud," is still sometimes used to express the case of a person acting in such a manner and under such circumstances that a fraudulent intention is imputed to him, although he was not in fact instigated by a morally bad motive; for instance, where the defendant had accepted a bill of exchange in the name of the drawee, purporting to do so by procuration, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, the jury negated a fraudulent intention in fact; but the court held that the defendant had committed a fraud in law, by making a representation which he knew to be untrue, and which he intended others to act upon. Polhill v. Walter, 3 B. & Ad. 114; per Parke B. Murray v. Mann, 2 Exch. 538, 541; Adams v. Paige, 7 Pick. 542. The fraudulent intention does not necessarily include an intention to benefit the party making the representation, or an intention to injure the party to whom the representation is made. Foster v. Charles, 6 Bing. 396; 7 Bing. 105; per Lord Campbell, Wilde v. Gibson, 1 H. L. Cas. 605, 633; Allen v. Addington, 7 Wend. 9. If a person makes a statement of fact, in the belief that it is true, though it is not true in point of fact, there is no fraudulent intention. Ormrod v. Huth, 14 M. & W. 651, 664; Haycraft v. Creasy, 2 East, 92; Rawlings v. Bell, 1 C. B. 951, 959; Cornfoot v. Fowke, 6 M. & W. 358; Early v. Garrett, 9 B. & C. 928; Shrewsbury v. Blount, 2 M. & G. 475; Evans v. Collins, 5 Q. B. 804; and a fraudulent intention cannot be imputed to a person by reason merely of his having constructive notice that a representation made by him is untrue, where he has no actual knowledge that it is untrue. Wilde v. Gibson, 1 H. L. Cas. 605. But a fraudulent intention is established if a person makes a statement false in fact without believing it to be true, although he may not have positive information that it is false. Taylor v. Ashton, 11 M. & W. 401, 415; Evans v. Edmonds, 13 C. B. 777, 786; where a person was induced to take shares in a company by a prospectus issued by the directors containing false statements, which the directors stated in an affidavit they believed to be true, a court of equity granted an injunction to restrain an action for calls upon the shares, because it did not appear

the policy is made upon an implied contract, that everything material known to the assured should be disclosed by them; (*q*) it is,

that the directors had any reasonable ground for believing the statement to be true. *Smith v. Reese River Co.* L. R. 2 Eq. 264. Where a person makes a statement, false in fact, which he believes to be true, if he at some former time knew the truth respecting the matter and ought to have remembered it, but forgot it at the time of making the statement, it is held in equity to be equivalent to a fraud, and vitiates an agreement induced by the statement. *Burrowes v. Lock*, 10 Ves. 470; *Pulsford v. Richards*, 17 Beav. 87, 94; *Slim v. Croucher*, 2 Giff. 37; S. C. 1 De G., F. & J. 518. Where a person makes a statement false in fact, which at the time he believes to be true, but afterwards discovers that it is false, if, after he has become aware that his statement is false, he suffers the other party to continue in error and act in the belief of his statement, this, from the time of the discovery, becomes a fraudulent representation, even though it was not so originally. See *Reynell v. Sprye*, 1 De G., M. & G. 660, 709. If a person is under a special duty to give correct information to another, and makes a statement which is in fact false, though he is not aware that it is false and believes it to be true, it is equivalent to a fraud, in that he cannot take advantage of the statement, and a contract made with him on the faith of it may be set aside. Where a partner in a bank, treating with a person about joining the partnership, made a statement respecting the affairs of the bank which was in fact false, though he was ignorant of the falsehood, the contract to join the partnership was set aside, on the ground that the partner making the statement was bound, in relation to the incoming partner, to know the state of the partnership affairs, and to give correct information. *Rawlins v. Wickham*, 1 Giff. 355; 3 De G. & J. 304. There are some contracts, as contracts of insurance, which are made on the basis of the truth of the statements of one of the parties; and such contracts are avoided by misrepresentation or

concealment of a material fact, without any fraudulent intention. In these cases the insurer relies for information of facts affecting the undertaking upon the insured; and in this respect the contract of an insurer differs from that of a surety or guarantor who looks not to the creditor, but to the debtor who asks his assistance, for information.]

(*q*) *Ib.*; per Lord Mansfield, *Carter v. Boehm*, 3 Burr. 1905, 1909; and see *Bates v. Hewitt*, L. Rep. 2 Q. B. 595; 2 Wms. Saund. 200 a, 200 b. [In contracts of marine insurance the risk insured against, which forms the subject of the contract, is commonly described by the assured, and is accepted by the insurer entirely upon his description. The accuracy and completeness of the description of the risk intended to be insured thus becomes an essential condition of the contract. The insured is bound to disclose and truly represent all material facts within his knowledge touching the risk; and the concealment or misrepresentation of any such fact avoids the contract, although not accompanied with any fraudulent intention; *Carter v. Boehm*, 3 Burr. 1905; 1 Smith L. C. (5th Eng. ed.) 472; per Bayley J. in *Lindenau v. Desborough*, 8 B. & C. 586, 592; *Behn v. Burness*, 3 B. & S. 751, 753; *Fitzherbert v. Mather*, 1 T. R. 12. According to Lord Mansfield (*Carter v. Boehm*, 3 Burr. 1905, 1909; 1 Smith L. C. (5th Eng. ed.) 472): "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent

moreover, a question for the jury, whether or not any particular

intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement." And according to Parke B. (*Moen v. Heyworth*, 10 M. & W. 147, 154): "Policies of insurance are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds; and it is material to see that it is not obtained by means of untrue representation or concealment in any respect." In a recent case in the exchequer chamber it was held that in policies of insurance on life it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life proposed for insurance, but that such condition, if intended, must be made the matter for express stipulation. Consequently, an erroneous statement, not fraudulently made, and the truth of which had not been expressly stipulated for as a condition of the contract, was held not to avoid the policy. *Wheelton v. Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241. Before this decision, the opinion seems to have prevailed that policies of insurance on life came under the same rule as policies of insurance on ships, namely, that they were made conditionally upon the truth and completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy. *Lindenau v. Desborough*, 8 B. & C. 586; and see *Jones v. Provincial Ins. Co.* 3 C. B. N. S. 65, 86; 26 L. J. C. P. 272, 274. It is, however, an implied condition that the person whose life is insured is alive at the time of the making of the policy; and where a policy was made upon the life of a person who was then dead, though neither party to the policy was aware of his death, the policy was held void. *Pritchard v. Merchants' Life Ins. Soc.* 3 C. B. N. S. 622; 27 L. J. C. P. 169. In effecting

policies of insurance on life it is commonly required by the insurer that the insured shall sign a written declaration containing certain statements respecting the life insured, and it is expressly stipulated in the policy that such declaration is the basis of the contract; the effect of which is, that an untrue statement contained in the declaration, though it be not fraudulent, and even though it be not material in inducing the policy, avoids the contract. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Cazenove v. British Equitable Ass. Co.* 6 C. B. N. S. 437; 28 L. J. C. P. 259. Such a declaration defines and limits by agreement the rights of the insurers as to the communication and materiality of facts; consequently, reticence or mistake respecting any matter not specified in the declaration, in the absence of fraud, does not affect the policy. *Jones v. Provincial Ins. Co.* 3 C. B. N. S. 65; 26 L. J. C. P. 272. It is sometimes expressly agreed between the insurer and insured that the policy shall not be disputed on the ground of merely untrue statements not fraudulently made; and then any misrepresentation or concealment undesignedly made does not avoid the policy. *Fowkes v. Manchester & London Life Assur. Assoc.* 3 B. & S. 917; 32 L. J. Q. B. 153. In the case of *Wood v. Dwaris*, 11 Ex. 493; 25 L. J. Ex. 129, an insurance company published a prospectus, undertaking that their policies should be indisputable except in cases of fraud, and a policy was made upon the faith of the prospectus, but did not incorporate it; the company was held, upon equitable grounds, to be precluded from disputing the policy upon the ground merely of an untrue statement, though the policy was expressed in its terms to be made upon the condition of the truth of such statement. But in the later case of *Wheelton v. Hardisty* (8 E. & B. 232; 26 L. J. Q. B. 265; and see *Wood v. Dwaris*, explained by Pollock C. B. in *Reeis v. Scottish Equitable Ass. Co.* 2 H. & N. 19; 26 L. J. Ex. 279), a difference of opinion seems to have been entertained

fact was material ; (*r*) and if it were, and were not communicated, no claim can be made by the assured, although it do not appear that he was aware of the materiality of such fact. (*s*)

So, if one party to a contract has made a representation to the other, on the faith of which he has agreed to enter into the contract ; and, before the contract is entered into, the facts are materially altered to the knowledge of the party who made the representation, but not to that of the other party ; and the latter stands by, and allows the former to enter into the contract in the belief that the facts continue to exist as represented : the contract will be void. (*t*) So where a creditor compounded with his debtor, under a false impression as to the ex-

amongst the judges as to the effect of such a prospectus upon a policy incorporating or referring to it. Where a person proposes to insure the life of another, and for that purpose refers the insurer to the person whose life is to be insured ; and to other named persons for the information respecting the life which may be required by the insurer, the persons thus referred to are not thereby constituted the agents of the insured in effecting the policy ; and if their information is false and fraudulent, but not to the knowledge of the insured, the insurer is not entitled to avoid the policy on the ground that it was induced by the fraud of an agent of the insured ; the insured is not affected by their statements unless it has been agreed that the policy shall be made upon the basis of those statements. *Huckman v. Fernie*, 3 M. & W. 505 ; *Wheelton v. Hardisty*, 8 E. & B. 232 ; 26 L. J. Q. B. 265 ; explaining *Everett v. Desborough*, 5 Bing. 503. Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy ; *Silleme v. Thornton*, 3 E. & B. 866 ; 23 L. J. Q. B. 362 ; and it seems that there is an implied condition, that the property insured shall not be altered during the term insured so as to increase the risk. See *Ib.* It has also been said, that there is an implied condition that no material alteration shall be made in the

premises during the term insured. *Stokes v. Cox*, 1 H. & N. 320, 533 ; 25 L. J. Ex. 291 ; 26 *Ib.* 113. But such conditions, if generally implied, are excluded by the insertion in the policy of express conditions respecting alterations in the premises insured. *Stokes v. Cox*, *supra*. In effecting insurances on property against fire, it is the duty of the insured to communicate to the insurer all material facts within his knowledge touching the property. *Bufe v. Turner*, 6 Taunt. 338 ; and see *Lindenau v. Desborough*, 8 B. & C. 586, 592 ; *Jones v. Provincial Ins. Co.* 3 C. B. N. S. 65, 86.]

(*r*) *Westbury v. Aberdeen*, 2 M. & W. 267 ; [Clark v. Manuf. Ins. Co. 2 How. (U. S.) 235 ; *New York Bowery Ins. Co. v. New York Ins. Co.* 17 Wend. 359 ; *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419.] Any fact is material within this rule, which, if made known to the underwriter, would have affected his estimate of the character and degree of the risk. Per *Kelly C. B. Harrower v. Hutchinson*, L. R. 5 Q. B. 584, 590.

(*s*) *Lindenau v. Desborough*, 8 B. & C. 586 ; *Maynard v. Rhode*, 3 M. & R. 45 ; 3 D. & R. 266 ; S. C. 1 C. & P. 360 ; *Everett v. Desborough*, 5 Bing. 503 ; *Elton v. Larkins*, 5 C. & P. 86.

(*t*) *Traill v. Baring*, 33 L. J. C. 521 ; and see *Hill v. Gray*, 1 Stark. 434 ; but see, as to this case, *Keates v. Earl Cadogan*, 10 C. B. 591, 600.

tent of the debtor's estate, in which the latter knowingly left him ; it was held that the composition was void, and that the creditor might sue for his original debt. (u) And where a party who was about to sell a public-house, falsely represented to B., who agreed to purchase it, that the receipts amounted to so much a month ; and B., to the knowledge of the defendant, communicated that representation to C., who afterwards agreed to become the purchaser instead of B. ; this was held to amount to a fraud by the defendant upon C. (x)

But there are cases in which the mere omission to communicate a fact will not amount to fraud, if the omission was made *bonâ fide* and without actual fraud. (x¹) Thus, where the prospectus of a joint stock company stated, that the capital consisted of 60,000 shares, of 25*l.* each ; but at the time the plaintiff executed the subscribers' agreement, the deposits had been paid only on 10,160 shares : it was held that, inasmuch as the directors might honestly suppose that other names would afterwards come in, the omission to communicate that fact to the plaintiff, at the time he executed the agreement, did not avoid that instrument, so as to entitle him to recover his deposit. (y)

Effect of mere omission without fraud.

Inadequacy of consideration will not, as we have before observed, (z) of itself, defeat the contract, or substantiate a charge

(u) *Vine v. Mitchell*, 1 Moo. & Rob. 337.

(x) *Pilmore v. Hood*, 6 Scott, 827. [See *Irving v. Thomas*, 18 Maine, 418 ; *Paddock v. Strobbridge*, 29 Vt. 470. If A., knowing that B. has made a false statement to C., takes advantage of the delusion created thereby to the injury of C., he will be liable. *Crocker v. Lewis*, 3 Sumner, 1, 8. See *Bowers v. Johnson*, 10 Sm. & M. 169 ; *Hunt v. Moore*, 2 Barr, 105 ; *Gerhard v. Bates*, 2 El. & Bl. 476.]

(x¹) [The mere unintentional concealment or omission, on the part of a vendor in the sale of a horse, to disclose the fact that the horse was materially diseased, known to the vendor but not to the purchaser, and to the knowledge of which the purchaser had not equal means of access, is not sufficient to sustain an action for deceit against the vendor to recover the damage suffered by the purchaser. Such concealment, to be actionable, must be ac-

companied with an intent to deceive. *Hanson v. Edgejly*, 29 N. H. 343 ; 2 Kent, 483, 490 ; *Stevens v. Fuller*, 8 N. H. 463 ; *Howard v. Gould*, 28 Vt. 423 ; *Paddock v. Strobbridge*, 29 Vt. 470. In *Fox v. Macreth*, 2 Bro. C. C. 420, Lord Thurlow advanced the opinion that a purchaser would not be bound, in negotiating for the purchase of an estate, to disclose to the seller his knowledge of the existence of a mine on the land, of which he knew the seller was ignorant. The same was held in *Harris v. Tyler*, 24 Penn. St. 347 ; 2 Kent, 484, 490. See *Laidlaw v. Organ*, 2 Wheat. 178 ; *Vernon v. Keys*, 12 East, 632 ; *Kintzing v. McElrath*, 5 Penn. St. 467 ; *Stevens v. Fuller*, 8 N. H. 463 ; *Howard v. Gould*, 28 Vt. 423 ; *Paddock v. Strobbridge*, 29 Vt. 470.]

(y) *Vane v. Cobbold*, 1 Exch. 798.

(z) *Ante*, 29.

of fraud. But, with other circumstances of suspicion, it may undoubtedly assist in establishing a fraud, at least in a court of equity. (a) And although weakness of intellect, short of insanity, in one of the contracting parties, is no ground, *per se*, for invalidating a contract; it may have that effect, if additional facts, betraying an intention to overreach, can be proved. (b)

Circumstances from which fraud may be presumed.

3. With regard to the cases in which a contract may be avoided, by reason of its being fraudulent as against persons not parties thereto, the result of the authorities is as follows.

Fraud on third persons.

Where a debtor in embarrassed circumstances enters into an arrangement, either by deed or otherwise, with his creditors, to pay them a composition upon their claims; or to discharge their demands, in full, by instalments at stated intervals; any private agreement, between such debtor and one of the creditors who professes to join in the general arrangement, that the former, or a third party for him, shall pay a further sum of money, or give a better or further security than such as is provided for the other creditors, is void as a fraud on them. For, in such cases, the creditors bargain for an equality of

Fraud on the creditors of an insolvent, who compounds with his creditors.

(a) 2 Bro. C. C. 175, 179, note; 3 V. & B. 117, 187; *Astley v. Weldon*, 2 B. & P. 851; *Fonbl. Tr. Eq.* (6th ed.) 127, n. (d). [Inadequacy of consideration alone, untinctured by fraud or circumvention, is not a sufficient ground to vacate a contract otherwise regular. *Stewart v. The State*, 2 H. & Gill, 114. See *Sarter v. Gordon*, 2 Hill Ch. 126. But gross inadequacy of price, is evidence from which a jury may presume fraud or mistake, if there be not circumstances in the case which rebut the presumption. *Brown v. Sawyer*, 1 Aik. 130. See *Western R. R. Corp. v. Babcock*, 6 Met. 346, 357, 358; *Osgood v. Franklin*, 2 John. Ch. 23; *Seymour v. Delancey*, 6 Ib. 222; *Cathcart v. Robinson*, 5 Peters, 264; 1 Sugden V. & P. (8th Am. ed.) 273 *et seq.* and notes.]

(b) *Osmond v. Fitzroy*, 3 P. Wms. 130; *Fonbl. Tr. Eq.* 6th ed. 68; 6 Bro. P. C. 137; *ante*, 187. [See *Farnam v. Brooks*,

9 Pick. 212; *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 15 John. 503; *Seaver v. Phelps*, 11 Pick. 304; *Grant v. Thompson*, 4 Conn. 204; 2 Story Eq. Jur. § 236; 1 Sugden V. & P. (8th Am. ed.) 275 *et seq.* and notes; *Whelan v. Whelan*, 3 Cowen, 537; *Bunch v. Hurst*, 3 Desaus. 292. A court of equity will, in favor of heirs, relieve against a contract and sale of real estate, where there was a great disparity in the mental capacities of the contracting parties, and where the inadequacy of consideration was so gross, as to leave no doubt that the vendor must have been laboring under the effect of some strange delusion in his own mind, in relation to the subject; although the grantor was not, strictly speaking, a *non compos mentis*, and although it does not strictly appear that the bargain was induced by false and fraudulent affirmations on the part of the purchaser. *Holden v. Crawford*, 1 Aik. 390.]

benefit, as to payment and security; there is a tacit understanding that all shall share alike, *pari passu*; and that it shall not be competent to one of them, without their knowledge, to stipulate for any *additional* benefit or security to himself. (c) Accordingly, if one creditor do make any such stipulation, in fraud of the other creditors, the effect thereof will be to destroy any security which may have been given to him, even for the legal amount of the composition. (d) And it makes no difference that the stipulation in question did not originate with the creditor, but in the voluntary offer of the debtor himself, or of a third person on his behalf; (e) or that the creditor has realized nothing under the agreement: for it is the mere fact of such an agreement having been made, which constitutes the fraud. (f)

So, where there is a composition, it is a fraud in any one creditor who concurred therein, to sue the insolvent contrary to the terms of such composition; (g) although such creditor was the last who agreed to the terms, or signed the deed; and although he did not actively induce any of the other claimants to agree thereto. (h)

And where a creditor executed a composition deed, containing a release, on being paid a larger sum than the amount of the composition on his debt, and on the representation of the debtor that no other creditor had been similarly preferred, which representation the debtor knew to be false; it was held that the creditor could not rely on this fact, in order to avoid his release, inasmuch as he himself was *particeps fraudis*. (i)

But it appears that the mere fact of one creditor undertaking to

(c) Daughlish v. Tennant, L. R. 2 Q. B. 49; Gibson v. Bruce, 5 M. & G. 329; Wilson v. Ray, 10 A. & E. 82; Cockshott v. Bennett, 2 T. R. 763; Jackson v. Lomas, 4 Ib. 166; Leicester v. Rose, 4 East, 371; Jackson v. Davison, 4 B. & Ald. 695, 697; Wells v. Girling, 1 B. & B. 447; Lewis v. Jones, 4 B. & C. 511, 515. See Tuck v. Tooke (in error), 9 B. & C. 437, as to pleading fraud of this kind.

(d) Howden v. Haigh, 11 A. & E. 1033; see per Littledale J. Ib. 1039. See observations of Alderson B. on this case, Davidson v. M'Gregor, 8 M. & W. 755, 763. [See Case v. Gerrish, 15 Pick. 50; Wiggins v. Bush, 12 John. 306; Payne v. Eden, 3

Caines, 213; Clark v. White, 12 Peters (U. S.), 178; Trumbull v. Tilton, 21 N. H. 128.]

(e) Knight v. Hunt, 5 Bing. 432.

(f) Higgins v. Pitts, 4 Exch. 312, 324; 18 L. J. Exch. 488, 493; Howden v. Haigh, 11 A. & E. 1033.

(g) See Cranley v. Hillary, 2 M. & S. 120; [Perkins v. Lockwood, 100 Mass. 249.]

(h) Steinman v. Magnus, 11 East, 390; Boothbey v. Sowden, 3 Camp. 175; Mackenzie v. Mackenzie, 16 Ves. 372; Cranley v. Hillary, 2 M. & S. 122.

(i) Mallalieu v. Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339.

discharge his debtor, on being paid a composition, in order to induce another creditor to discharge that debtor on being paid a like composition, does not prevent the former from afterwards recovering from the debtor ; unless there be evidence that all, or at least a majority of the creditors, came in to the same terms. (*k*) Nor will the mere fact of one creditor having promised to execute a composition deed, if another will do so, prevent the former from afterwards suing for his debt, although the latter may have executed the deed on the faith of such promise. (*l*)

Where a creditor, who had two distinct demands against his debtor, B., seized the goods of B. under an execution for one of them, and afterwards at a meeting of some of the creditors of B., when a composition was proposed, declared that he would not agree to the composition, unless the debt for which the goods had been seized were secured to him ; and C., who was not a creditor, guaranteed the debt ; and A. withdrew his execution, and signed the composition deed ; it was held that the bargain was a fraud upon the rest of the creditors, and therefore void. (*m*)

And a creditor, who affects to join in a general arrangement for settling the affairs of the debtor, is not allowed to keep back part of his demand, and sign for the remainder only, and then to sue the debtor for that portion which he did not include in the deed of arrangement. Thus in *Britten v. Hughes*, (*n*) it appeared that the plaintiffs, together with several creditors of the defendant, executed a composition deed, by which they consented to take ten shillings in the pound, in full for their respective debts. The sums due to the several creditors were inserted opposite to their respective names in a schedule at the foot of the deed. The deed contained a general release of the defendant, by all the creditors who had signed. The plaintiffs were the holders of two bills of exchange, drawn by the defendant, and overdue when they signed the deed ; and they, at the request of the defendant, inserted in the schedule the amount of one of them only, as he said that the plaintiffs might recover the amount of the other from the acceptor ; but the latter having refused payment, the plaintiffs sued the defendant as drawer ; and it was held, that they were not entitled to recover ;

(*k*) *Reay v. Richardson*, 2 Cr., M. & R. 422 ; and see remarks of Lord Abinger, *Ib.* 428 ; *Wood v. Roberts*, 2 Stark. 417 ; *Clark v. Upton*, 3 M. & R. 89.

(*l*) *Boyd v. Hind*, 1 H. & N. 938.

(*m*) *Coleman v. Waller*, 3 Y. & J. 212.

(*n*) 5 Bing. 460.

the concealment of a part of their debt being a fraud on the rest of the creditors ; and the general words of the release not being restrained by a previous recital, that the defendant was indebted to his creditors in the several sums set opposite to their names in the schedule.

And it has likewise been held, that where a creditor signs, seals, and delivers a composition deed, although he does not set the amount of the debt opposite to his name in the deed, yet he is bound by the terms of the composition, to the amount of his then existing debt. (*o*)

So, if a private agreement made by one creditor with a debtor, in consideration of the former signing a composition deed, be void on the ground of fraud, no security obtained by virtue thereof is rendered valid, by the arrangement for such composition deed being afterwards abandoned. Thus, where I. S., who was then in embarrassed circumstances, was indebted to the plaintiff for money lent ; and the plaintiff informed him that, if he would give security for its repayment, he, the plaintiff, would procure his creditors to accept a composition ; and the defendant became surety for I. S. in a joint promissory note, on the understanding that this was to be kept secret from the other creditors ; after which the plaintiff endeavored to obtain a composition, but failed ; it was held, that he could not recover on the note as against the defendant, because the transaction was fraudulent and void in its inception. (*p*)

And where there is such a fraudulent agreement between a debtor and one of his creditors, the debtor stands in no better position than the creditor ; and, accordingly, if such agreement contain a stipulation by the creditor to indemnify the debtor against the original debt, the debtor cannot enforce such stipulation against the creditor. (*q*)

But a gratuitous payment, or an additional security made or given to a particular creditor, *after* he has signed the composition deed, is not a fraud on the other creditors ; provided it were not made or given in pursuance of a prior agreement between the parties, entered into for the purpose of inducing the creditor to accede to the general arrangement. (*r*)

(*o*) *Hartry v. Wall*, 1 B. & Ald. 103.

(*p*) *Wells v. Girling*, 1 B. & B. 447.

(*q*) *Higgins v. Pitts*, 4 Exch. 312, 324 ;
18 L. J. Exch. 488.

(*r*) See per Best C. J. and Park J.
Knight v. Hunt, 5 Bing. 432, 434. The
giving up, by the creditor, of an instru-
ment whereby a debt barred by a compo-

It has, however, been held in bankruptcy, that if a bankrupt enter into a composition deed, whereby his creditors release him from their debts, a promissory note subsequently given to a creditor for the remainder of his claim, is not a good petitioning creditor's debt. (s)

And where the creditors of an insolvent agreed, by an instrument not under seal, that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would thereafter release him from all demands; and one of the creditors who signed for the whole amount of his debt held, at the time, as a security for part, a bill of exchange drawn by the debtor for a valuable consideration, and accepted by a third person; and the money due on this bill was afterwards paid by the acceptor; it was holden that the creditor might retain it,—the agreement of composition not containing any stipulation for giving up securities, (t) and the effect of it not being to *extinguish* the original debt. (u)

sition deed was secured, is not a sufficient consideration to support a promise by the debtor, to pay the residue of such debt beyond the amount received under the deed. *Cowper v. Green*, 7 M. & W. 633. As to recovering back money paid to induce a creditor to sign a composition deed, see *Wilson v. Ray*, 10 A. & E. 82; *Bradshaw v. Bradshaw*, 9 M. & W. 29; *Smith v. Cuff*, 6 M. & S. 160.

(s) *Ex parte Hall*, 1 Deac. 171.

(t) Where such is evidently the meaning of the agreement, the principal cannot sue on such securities; *Stock v. Mawson*, 1 B. & P. 286; or retain, as against the other creditors, any money received by virtue thereof. *Alsager v. Spalding*, 6 Scott, 204.

(u) *Thomas v. Courtney*, 1 B. & Ald. 1. It will be observed that in this case the acceptor of the bill held by the creditor had not, on taking it up, any remedy over against the debtor. Where the composition agreement shows that the debtor is to pay only a specific composition to each creditor in full, and there is no clause as to securities, the creditor cannot act upon securities held by him against third persons, if the latter, on satisfying such se-

curities would have a right of action against the debtor, as for money paid for him. For in this event, the debtor would indirectly pay a larger composition on the particular debt than the deed provides, in violation of the tacit understanding of the creditors to the contrary. See *Lewis v. Jones*, 4 B. & C. 506. But in *Mallett v. Thompson*, 5 Esp. 178, Lord Ellenborough is reported to have held that although the creditor had received a composition and executed a general composition deed, and had therein covenanted "not to sue or otherwise molest the debtor," who in that case was the payee and indorser of a note made for his accommodation,—he might still sue the maker, although the latter, on paying the note, would have his remedy against such payee. Several of the cases on the effect of allowing the creditor to sue third persons on existing securities, after compounding with his debtor, are collected in a note to *Lewis v. Jones*, 4 B. & C. 515. If there be an express reservation of securities, sureties may be sued. *Nichols v. Norris*, 3 B. & Ad. 41. [See *Seymour v. Minturn*, 17 John. 169; *Geisner v. Kershner*, 4 Gill & J. 305; *Inman v. Griswold*, 1 Cowen, 199; *Makepeace v. Harvard*

The principle on which the bankrupt acts are founded is, that the property of the debtor shall be divided ratably amongst his creditors ; and, therefore, any agreement between a bankrupt and one of his creditors, the object of which is to secure to the latter a preference on the future effects of the debtor, is void as a fraud on the other creditors. (x) Thus, an agreement between an insolvent debtor and his assignee, whereby an estate of the insolvent was to be held by the assignee, in trust to pay, out of the rents and profits, annuities to the insolvent and his wife, and to apply the surplus towards the extinction of a debt owing to the assignee, was, — on being brought before a court of equity at the instance of the insolvent himself, — rescinded as a fraud on the creditors. (y)

Fraud on
creditors,
under the
bankrupt
acts.

So, a contract with a bankrupt, to pay him a sum of money, if he would induce his assignees to sell to the person who was to make such payment, part of the property of the bankrupt for a given sum, is a fraud on the creditors, and void. (z)

For the same reason, an agreement by one creditor to pay to the assignees of a bankrupt, a sum equal to ten shillings in the pound on all debts proved against the estate, in consideration of being allowed the amount of his own claim in full, is void, — even although the presumption be, that the creditors might be benefited thereby. (a) And so money paid by a party in contemplation of bankruptcy, to one who was not, at the time, his creditor, but who was jointly liable with him, in order to indemnify the latter against such joint liability, may be recovered by the assignees as money received to their use. (b)

4. We have already fully considered the cases in which a *surety* will be discharged from responsibility, by reason of the secret dealings of the principal and the debtor, in violation of the express or implied contract of the surety.

Fraud on
parties col-
laterally in-
terested in a
contract.

And on the same principle it is held, that if A. agree to give B. a certain sum for goods, in advancement of C. ; any secret agreement between B. and C., that the latter shall pay a further sum, is void, as a fraud on A., although the bill of sale be

College, 10 Pick. 298 ; Clark v. White,
12 Peters, 178.]

(z) M'Shane v. Gill, 1 C. & P. 149.

(a) Steaines v. Wainwright, 8 Scott,

(x) Jackson v. Davison, 4 B. & Ald. 280.

691 ; Rogers v. Kingston, 2 Bing. 441.

(b) Groom v. Watts, 4 Exch. 727.

(y) M'Neill v. Cahill, 2 Bligh, 229.

made to A.; and B. cannot recover such further sum against C. (c)

It is likewise reported to have been held by Lord Ellenborough, that a secret agreement to allow a poundage to a person, for recommending a third party to buy goods of him who was to pay the poundage, is void, as a fraud on the customer. (d) But in a subsequent case his lordship is reported to have expressed an opinion, that an agreement to pay the plaintiff a percentage, for introducing the defendant, a medical man, to a partnership with a medical practitioner, upon a premium being paid to the latter, is not invalid. (e)

We have likewise seen, that if a man sell goods, and still continue in possession as visible owner thereof, such sale may be void as against creditors, so that the goods may be taken in execution by them. (f)

And an agreement made in consideration of the sale or relinquishment of an office, although it be not of a public character, is void on the ground of fraud, if it be made without the knowledge or sanction of the person who has the right of appointing to such office. (g) Where, therefore, A., who held an office for life, which was in the gift of B., agreed with C. to resign, and to procure the appointment for him; and C., in consideration thereof, agreed that A. should have a moiety of the profits; and A., having resigned, procured the appointment of C.; it was held that such an agreement, not having been communicated to B., was void as a fraud on him. (h)

But it seems that, at law, a contract is not illegal or void, merely because private rights may be interfered with by the act stipulated for. Thus, where the consideration involves a breach of contract or trust, of which a court of equity alone can take cognizance, the contract may be enforced at law, and the persons injured by its performance must obtain redress by applying to a court of equity. (i)

(c) *Jackson v. Duchaire*, 3 T. R. 551.

(d) *Wyburd v. Stanton*, 4 Esp. 179.

(e) *Edgar v. Blick*, 1 Stark. 464. An agreement to sell a business or good-will, and recommend customers, is good. See *Bunn v. Guy*, 4 East, 190; *Bryson v. Whitehead*, 1 S. & S. 74.

(f) *Ante*, 573 *et seq.*

(g) *Parsons v. Thompson*, 1 H. Bl. 322, 327; *Harrington v. Du Chatel*, 1 Bro. C. C. 124; *Blachford v. Preston*, 8 T. R. 89.

(h) *Waldo v. Martin*, 4 B. & C. 319.

(i) See *Warwick v. Richardson*, 10 M. & W. 284, 295.

CHAPTER V.

OF THE USUAL DEFENCES TO ACTIONS ON CONTRACTS.

1. Performance of the Contract, and Excuses for the Non-performance thereof.
2. Payment.
3. Accord and Satisfaction.
4. That a Bill of Exchange or other Negotiable Security, has been taken for the Debt.
5. Release of the Claim by Act of the Party, or by Operation of Law.
6. Another Action pending — Judgment recovered.
7. Arbitrament and Award.
8. Tender of the Debt.
9. Statute of Limitations.
10. Set-off.
11. Infancy.
12. Coverture.
13. Bankruptcy.
14. Equitable Defences.

1. *Performance of the Contract, and Excuses for the Non-performance thereof.*

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| <ol style="list-style-type: none">1. By whom the contract is to be performed.2. How it is to be performed.3. When it is to be performed. | <ol style="list-style-type: none">4. Of notice and request to perform.5. Excuses for non-performance.6. Of rescinding the contract. |
|--|---|

1. THE rule of law is, that the person who is to be discharged from his liability upon a contract, by the performance of a certain act, is impliedly bound to do, or cause to be done, the act which is to discharge him. (a) Thus, where the creditors of an insolvent debtor agreed to receive a composition on their respective debts, to be secured by the promissory notes of the debtor, payment of which was to be guarantied by a third person ; it was held to be incumbent on the debtor to tender

By whom the contract is to be performed.

(a) See per Lord Ellenborough, *Cranley v. Hillary*, 2 M. & S. 120, 122. As to the party who may perform a condition, see Co. Litt. 210 b, 211 a, 220 ; Bac. Abr. Conditions ; Bro. Abr. Conditions, 174 ; and see *Cheney's case*, 3 Leon. 260.

such notes to the creditors, in order to bar their original claims, unless the latter had, by their conduct, dispensed with such tender. (*b*) So, if a party has to pay a sum of money, a mere readiness to pay is insufficient; but he is bound to go to the party who is entitled to receive the money, and to pay or tender the same to him, in order to exonerate himself from liability. (*c*) And so the acceptor of a bill or the maker of a note is, in general, liable thereon, although the instrument has not been presented for payment; it being legally incumbent upon the acceptor or maker to pay it without presentment. (*d*)

2. With regard to the *mode* of performing a contract, but few observations need be made; as it is obvious that an agreement must always be executed according to its legal effect. (*d*¹) Thus a party is equally guilty of a breach of his

(*b*) *Cranley v. Hillary*, 2 M. & S. 120; *Reay v. White*, 1 C. & M. 748.

(*c*) Co. Litt. sect. 340; *Soward v. Palmer*, 2 Moore, 276; *Cranley v. Hillary*, 2 M. & S. 120, 122.

(*d*) *Turner v. Hayden*, 4 B. & C. 1.

(*d*¹) [When a contract stipulates for the conveyance of lands or estate, or for a title to it, performance can be made only by the conveyance of a good title. And when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed or conveyance as the contract describes, however defective the title may be. *Hill v. Hobart*, 15 Maine, 164. See *Lawrence v. Dole*, 11 Vt. 549; *Parker v. Parmele*, 20 John. 130; *Tinney v. Ashley*, 15 Pick. 546. A contract to make and execute "a good and sufficient deed to convey the title to said premises," is not performed, unless a good title to the land passes by the deed. *Hill v. Hobart*, 15 Maine, 164; *Pugh v. Chesseldine*, 11 Ohio, 109. See, also, *Tinney v. Ashley*, 15 Pick. 546; *Smith v. Haynes*, 9 Greenl. 128; *Tremaine v. Lining*, *Wright*, 644; *Brown v. Gammon*, 14 Maine, 276; *Stone v. Fowle*, 22 Pick. 166. A contract "to convey the land by a deed of conveyance," for a stipulated price, is not performed by executing a deed of conveyance merely. The party must

be able to convey such a title as the other party had a right to expect. *Lawrence v. Dole*, 11 Vt. 549. It has been held in Ohio that a contract for a good title was discharged by a tender of a quit-claim deed, the grantor having the whole title. *Pugh v. Chesseldine*, 11 Ohio, 109. See 2 Sugden V. & P. (8th Am. ed.) 573, note (*d*). In the absence of express conditions to the contrary, the vendor must make a good title to the land. *Hall v. Betty*, 4 M. & G. 410; *Souter v. Drake*, 5 B. & Ad. 992; *Doe v. Stanion*, 1 M. & W. 695, 701. A court of equity will not compel a purchaser to take a doubtful title. *Marlon v. Smith*, 2 P. Wms. 198; *Shapland v. Smith*, 1 Bro. C. C. 75; *Vancouver v. Bliss*, 11 Ves. 458, 465; *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; *Pyrke v. Waddington*, 10 Hare, 1. And it has been held in a court of law that a good title, to be made under a contract for the sale of land, means not merely a good legal title, but such a title as a court of equity would require as sufficient ground for compelling specific performance against the purchaser. *Jeakes v. White*, 6 Exch. 873; and see *Simmons v. Heseltine*, 5 C. B. N. S. 554. A purchaser agreeing to take the vendor's title "without dispute," is precluded, both at law and in equity, from raising any objection to it. *Duke v.*

contract, whether he directly refuses to perform it, or voluntarily does an act which puts it out of his power to perform it, (*e*) or which prevents the other party from having the benefit of it. (*f*) So, if one party agree to deliver up a written instrument to another, he is bound to deliver up such instrument, in the same condition in which it was at the time he contracted to deliver it. (*g*) So, if there be a contract to deliver a certain quantity of goods, it will not be satisfied by showing, that the contractor was ready and willing to deliver a larger quantity; even although it appear that the party to whom they were to be delivered refused to receive any part of them. (*h*) So, where there was an agreement to deliver

Barnet, 2 Coll. C. C. 337. So, where the purchaser agrees to take such title as the vendor has, he is not entitled to a better one. *Wilmot v. Wilkinson*, 6 B. & C. 506; *Fremer v. Wright*, 4 Madd. 364; *Cattell v. Carroll*, 3 Y. & C. Ex. 413; *Hume v. Pocock*, L. R. 1 Eq. 423; S. C. L. R. 1 Ch. Ap. 379. On a contract for the sale of land by description, the property proposed to be conveyed must agree with the description of the property contracted for; and if it does not, a court of equity will not, in general, enforce the contract. *Stanton v. Tattersall*, 1 Sm. & G. 529; and see *Flight v. Booth*, 1 Bing. N. C. 370; *Jones v. Edney*, 3 Camp. 285. A contract for the purchase of certain land, *prima facie* would mean the purchase of the fee-simple; but if the purchaser knew that the vendor had not such an estate, and did not profess to have a fee-simple, then the contract might impart such interest as the purchaser knew the vendor had; if the purchaser had no such knowledge, he might exercise an option of taking such an estate as the vendor had, but could not be compelled to take any other estate than that which he contracted to purchase. Per *Kindersley V. C.* *Cox v. Middleton*, 2 Drew. 209. A contract for the sale of land is not satisfied by conveying land subject to rights of which the purchaser had no notice; as a right of sporting; *Burnell v. Brown*, 1 Jac. & W. 168; or a right of common; *Gibson v. Spurrier*, Peake Add. Cas. 49; or a right of way; *Dykes v. Blake*, 4 Bing. N. C. 463; but

where a right of way over land contracted to be sold was obvious, consisting of a road through it, the purchaser was held bound to complete the purchase. *Bowles v. Round*, 5 Ves. 508.]

(*e*) See *Stirling v. Maitland*, 5 B. & S. 840; *M'Intyre v. Belcher*, 14 C. B. N. S. 654; *Charnley v. Winstanley*, 5 East, 266.

(*f*) *Inchbald v. Western & c. Coffee Company*, 17 C. B. N. S. 733.

(*g*) *Richardson v. Barnes*, 4 Exch. 128, 132.

(*h*) *Dixon v. Fletcher*, 3 M. & W. 146; and see *Rylands v. Kreitman*, 19 C. B. N. S. 351; *Levy v. Green*, 28 L. J. Q. B. 319; *Gorman v. Boddy*, 2 C. & K. 145, 148. [In such case the buyer is, in general, entitled to refuse the whole. *Cross v. Eglin*, 2 B. & Ad. 106; *Levy v. Green*, 8 El. & Bl. 75; *Hart v. Mills*, 15 M. & W. 85. So, if the seller delivers a smaller quantity of goods than is contracted for, in discharge of his contract, it is not sufficient, and such smaller quantity may be refused by the purchaser; *Waddington v. Oliver*, 2 B. & P. N. R. 61; *Oxendale v. Wetherell*, 9 B. & C. 386; *Hoare v. Rennie*, 5 H. & N. 19; but if the purchaser accepts the quantity delivered, the seller is entitled to recover from him the price of the goods so accepted. *Morgan v. Gath*, 3 H. & C. 748; *Bowker v. Hoyt*, 18 Pick. 555; *Wilde J. in Snow v. Ware*, 13 Met. 49; *ante*, 617, and note (*h*). In contracts for the sale of goods, the quantity of goods to be delivered is sometimes specified, with

up certain bills of exchange, which were foreign bills, drawn in sets of three: it was held that this agreement was not performed, by the delivery up of one part of each of the bills in question. (*i*) So, an agreement to pay a sum of money by promissory notes, is not performed by merely giving the notes, if they be not paid when due. (*j*) So, where a lessee of premises contracted to insure in the names of the lessors; it was held that this contract was not performed, by insuring in their names and his own jointly. (*k*) And so, a covenant by a lessee, to insure the premises in the joint names of the lessor and himself, is not performed by the lessee insuring in his own name only. (*l*) But it has been held, that a covenant by a lessee, to insure in the joint names of the lessor and himself, is well performed by his insuring in the name of the lessor only. (*m*)

When there are several ways in which the contract might be performed, that one is generally adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant. (*n*)

Where contract may be performed in several ways.

the addition "more or less;" in such cases the quantity which the seller may deliver in fulfilment of his contract, has certain reasonable limits of allowance, according to the circumstances of each case. See *Cross v. Eglin*, 2 B. & Ad. 106; *Cockerell v. Aucompte*, 2 C. B. N. S. 440; *Gibbs v. Gray*, 2 H. & N. 22. So in a contract to deliver "about" a specified quantity of goods. *Bourne v. Seymour*, 16 C. B. 337. Under a contract to sell and deliver a certain quantity of goods then being in a warehouse in Liverpool, the giving a delivery order of "about" the quantity, evidence being admitted of a usage of warehousemen then not to accept delivery orders in any other form, was held to be a sufficient performance. *Moore v. Campbell*, 10 Exch. 323. See *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *Robinson v. Noble*, 8 Peters, 589.]

(*i*) *Kearney v. West Canada Gold &c. Company*, 1 H. & N. 412.

(*j*) *Dixon v. Holdroyd*, 7 E. & B. 903.

(*k*) *Penniall v. Harborne*, 11 Q. B. 368.

(*l*) *Doe d. Muston v. Gladwin*, 6 Q. B. 953.

(*m*) *Per Wood V. C. Havens v. Middle-*

ton, 22 L. J. C. 746. [A covenant to insure is broken if the premises are left in part uninsured for any time, although afterwards wholly insured, and although no loss has occurred from the defective insurance. *Penniall v. Harborne*, 11 Q. B. 368. A contract providing for keeping up the insurance of a ship, was held to be broken by failing to keep the ship actually insured for three days, although the usual slip for the insurance had been delivered by the underwriters, in accordance with which the policy was afterwards executed, and no loss was sustained by the omission. *Parry v. Great Ship Company*, 4 B. & S. 556. In an action for a breach of a covenant in a farming lease, in selling a quantity of farm-yard manure, and allowing it to be carried off the premises, the defendant pleaded that he brought back a greater quantity of manure, and of better quality, in place of that carried off; but the plea was held bad, as substituting a performance different from that contracted for. *Leigh v. Lillie*, 6 H. & N. 165.]

(*n*) *Per Maule J. Cockburn v. Alexander*, 6 C. B. 791, 814.

When a contract is in the *alternative*, — as that the promiser shall do a certain act “on the 1st of January, *or* the 1st of February;” or shall “pay a sum of money, *or* deliver a horse to the promisee;” and one branch of the Contract in the alternative. alternative cannot be performed, the promiser is bound to perform the other. (*o*) And, in such cases, the right to select the mode of performance is impliedly vested in the promiser, (*p*) — the rule being, that “in case an election be given of two several things, always he that is the first agent, and which ought to do the first act, shall have the election.” (*q*) Thus, if A. agree to reinvest a sum in the three per cent. consols, in the name of B., charging the stock at a certain price, or to pay the sum in bank-notes, *on B. giving A. six months’ notice*; it is in the election of B. whether he will have the money reinvested, or paid in bank notes. (*r*). [An agreement may be optional with one party, and not so, but binding, with the other.] (*r*¹).

(*o*) *Stevens v. Webb*, 7 C. & P. 60, 62. [A written promise to pay a certain sum of money to “A. or B.” may be enforced in an action by A. and B. jointly. *Osgood v. Pearsons*, 4 Gray, 455; *Walrad v. Petrie*, 4 Wend. 575; *Jerome v. Whitney*, 7 John. 321; *Willoughby v. Willoughby*, 5 N. H. 244.]

(*p*) Per Lord Mansfield C. J. *Layton v. Pearce*, 1 Dougl. 15, 16. See *Penny v. Porter*, 2 East, 2; [*Mayer v. Dwinell*, 29 Vt. 298; *Patchin v. Swift*, 21 Vt. 292; *Smith v. Sanborn*, 11 John. 59; *Small v. Quincy*, 4 Greenl. 497; *Giles v. Bradley*, 2 John. Cas. 253; *Appleton v. Chase*, 19 Maine, 79; *State v. Worthington*, 7 Ohio, 171. If one contract in the alternative to do one of two things by a certain day, he has, until the day is past, the right to elect which of them he will perform; but if he suffer the day to elapse without performing either, his contract is broken, and his right of election lost. *Choice v. Moseley*, 1 Bailey, 136. See, also, *Shearer v. Jewett*, 14 Pick. 232; *McNitt v. Clark*, 7 John. 465. In *Small v. Quincy*, *supra*, where A. contracted to deliver to B. “from one to three thousand bushels of potatoes,” it was held that he might de-

liver any quantity he chose between one and three thousand bushels.]

(*q*) Co. Litt. 145 a; and see *South Eastern Railway Company v. The Queen*, 17 Q. B. 485, 492. By the French law, “the election belongs to the debtor, if it have not been expressly accorded to the creditor. A debtor may discharge himself by delivering one of two things promised; but he cannot compel the creditor to receive one part of one and one part of the other. An obligation is pure and simple, although contracted in an alternative manner, if the one of two things promised could not be the subject of obligation.” — Code Civil, bk. 3, tit. 3, art. 1190.

(*r*) *Chippendale v. Thurston*, 4 C. & P. 98.

(*r*¹) [*Disborough v. Neilson*, 3 John. Cas. 81; *Peck v. Hubbard*, 11 Vt. 612. In *Disborough v. Neilson*, *supra*, it appeared that A. agreed to deliver to B., by the first of May, from seven hundred to one thousand barrels of meal, for which B. agreed to pay on delivery, at the rate of six dollars per barrel, and A. delivered seven hundred barrels, and also before the day named, tendered to B. three hundred barrels more, to make up the one

But if the promiser once make his election, he is absolutely bound thereby. (s)

And where rent was reserved by agreement, "to be paid quarterly, or half quarterly if required;" and the landlord received such rent quarterly for a twelvemonth; the court seemed to incline to the opinion, that he had made his election as to the period of payment, and that, therefore, he could not, without notice, distrain for a half quarter's rent. (t)

3. Where a party to a contract undertakes to do some particular

When it is to be performed.

act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance; the law implies an engagement that it shall be

executed within a reasonable time, without reference to extraordinary circumstances. (u) Thus, in the case of a covenant at all times

thousand barrels, which B. refused; it was held that B. was bound to receive and pay for the whole one thousand barrels, the delivery of any quantity between seven hundred and one thousand barrels being at the option of A. only, and for his benefit. See *Giles v. Bradley*, 2 John. Cas. 253.]

(s) *Brown v. Royal Insurance Society*, 1 E. & E. 853; 28 L. J. Q. B. 275; *Gath v. Lees*, 3 H. & C. 558; Co. Litt. 146 a.

(t) *Mallam v. Arden*, 10 Bing. 299.

(u) See per *Pollock L. C. B. Jones v. Gibbons*, 8 Exch. 920, 922; *Ford v. Cotsworth*, L. R. 4 Q. B. 127, 133; *Sansom v. Rhodes*, 8 Scott, 544; *Adams v. Royal Mail Steam Packet Co.* 5 C. B. N. S. 492; [*Startup v. Macdonald*, 6 Man. & G. 593, 611, Rolfe B.; *Atwood v. Cobb*, 16 Pick. 231; *Roberts v. Beatty*, 2 Penn. 63; *Phillips v. Morrison*, 3 Bibb, 105; *Sawyer v. Hammond*, 15 Maine, 40; *Howe v. Huntington*, 15 Maine, 350; *Atkinson v. Brown*, 20 Maine, 67; *Cameron v. Wells*, 30 Vt. 633; *Hales v. London & North Western Railway Co.* 4 B. & S. 66; *Taylor v. Great Northern Railway Co.* L. R. 1 C. P. 385. If a contract or order, under which goods are to be furnished, does not specify any time at which they are to be delivered, the law implies a contract, that they are to be delivered within a reasonable time. *Adams v. Adams*, 26 Ala. 272;

and no evidence will be admitted to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument. *Cocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530; *Shaw C. J. in Atwood v. Cobb*, 16 Pick. 227. But parol evidence has been admitted to show what the party to be affected considered a reasonable time. *Coates v. Sangston*, 5 Md., 121; *Cocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530; *Ellis v. Thompson*, 3 M. & W. 445. What is a reasonable time, within which a contract is to be performed, where the contract is silent on the subject, is a question of law. *Attwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Maine, 164; *Howe v. Huntington*, 15 Maine, 350; *Kingsley v. Wallis*, 14 Maine, 57; *Murray v. Smith* 1 Hawks, 41. And it is to be determined by a view of all the circumstances of the case. *Cocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530. This question has, however, sometimes, under peculiar circumstances, been submitted to the jury. See *Howe v. Huntington*, 15 Maine, 350; *Hill v. Hobart*, 16 Maine, 164; *Greene v. Dingley*, 24 Maine, 131; *Cocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530. Where a contract is made for the payment of specific articles, such as the

to make further assurance, a reasonable time to levy a fine, as advised by counsel, shall be allowed. (*v*)

Where the act to be done is one in which both parties to the contract are to concur, the engagement implied by law is, not that the act shall be done within either a fixed or a reasonable time, but that each shall use due diligence in performing his part. (*x*)

But, as we have seen, (*y*) where a contract is to be performed "directly," this does not mean "within a reasonable time," but "speedily," or "as soon as possible." (*z*) And so, a contract by a manufacturer to furnish certain specified goods "as soon as possible," means that he is to furnish them within a reasonable time, regard being had to his facilities and extent of business, and to the contracts he may already have in hand. (*a*)

[So, a contract to be performed "forthwith," was held not necessarily to mean immediately.] (*a*¹)

So, where the contract was, to sell certain goods to the defendants, "the said goods to be delivered *forthwith*, and the price to be paid by the defendants, in cash, in fourteen days from the time of the making of the said contract;" it was held, that by the use of the word "forthwith," in connection with the payment in fourteen days, it was manifest that the parties intended the goods to be delivered at some time within the fourteen days. (*b*)

Where a contract is to be performed within or at the expiration of a *month*, the general presumption of law is, that the parties meant a *lunar*, not a calendar month. (*c*) But

Time, how
computed.

payee should select, at a place designated, but no time fixed for the payment, such articles are payable on demand. *Russell v. Ormsbec*, 10 Vt. 274. And in such case, if the goods are specified, the party agreeing to deliver them must have them always ready at the place. *Bailey v. Simonds*, 6 N. H. 159.]

(*v*) *Pexpoint v. Thimblebye*, 1 Roll. Abr. 441; 1 Ld. Raym. 402. So, in the case of a covenant to find security. *Peeter v. Carter*, 1 Roll. Abr. tit. Condition (D.), 438.

(*x*) *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 133.

(*y*) *Ante*, 114.

(*z*) *Duncan v. Topham*, 8 C. B. 225.

(*a*) *Attwood v. Emery*, 1 C. B. N. S.

110, 115. [If by the terms of a contract, each party is to do certain acts upon the happening of a certain future event, and no time when is fixed, performance or tender of performance must be made within a *reasonable time* after the event happens; that is, so much time as is necessary conveniently to do what the contract requires should be done. *Howe v. Huntington*, 15 Maine, 350.]

(*a*¹) [*Roberts v. Brett*, 20 C. B. N. S. 148.]

(*b*) *Staunton v. Wood*, 16 Q. B. 638.

(*c*) *Per Cur. Simpson v. Margitson*, 11 Q. B. 23, 31. The word *month* in a statute passed since the 13 & 14 Vict. c. 21, s. 4, *primâ facie* means *calendar month*.

if the context shows that a calendar month was intended, the court may adopt that construction. (*d*) And, in like manner, the circumstances in which the contract was made, or the proof of some custom in the place where, or in the trade with reference to which it was made, may rebut the presumption, and show that a calendar month was intended. (*e*)

In the case of mercantile instruments, however, the word "month" is understood to mean "calendar month." (*f*)

Where, by the contract, a party is to have so many *days* for doing an act, — *e. g.* where the charterer of a ship is allowed by the charter-party, so many "running days" for loading the ship, — the days mean consecutive days, including Sundays, unless there be a custom to the contrary. (*g*)

Where time is to be computed from an *act* to be done, the mode of calculating the time must depend on the circumstances of the particular contract. (*h*) But it seems, that unless the act to be done is one to which the party to be affected by the computation is party or privy, the day of doing the act shall be excluded. (*i*)

So, where a contract is to be performed within a certain time after the date, or day of the date, it seems that the day of the date is to be excluded. (*k*) And where goods were sold "to be paid

(*d*) *Simpson v. Margitson*, 11 Q. B. 23.

(*e*) *Ib.*; *Lang v. Gale*, 1 M. & S. 111; *Barksdale v. Morgan*, 4 Mod. 185; *Jocelyn v. Hawkins*, 1 Str. 446; *Titus v. Lady Preston*, *Ib.* 652; 3 Chitty's Statutes, tit. Time, 1374, note (*c*); *Jolly v. Young*, 1 Esp. 186.

(*f*) Per *Littledale J. Reg. v. Chawton*, 1 Q. B. 247, 250; *Hart v. Middleton*, 2 C. & K. 9, 10; [*Thomas v. Shoemaker*, 6 Watts & S. 179. So in a statute. *Bremer v. Harris*, 5 Grattan, 285; *Churchill v. Merchants' Bank*, 19 Pick. 532.]

(*g*) *Brown v. Johnson*, 10 M. & W. 331, 334.

(*h*) Per *Grant M. R. Lester v. Garland*, 15 Ves. 247, 248; *Wilkinson v. Gaston*, 9 Q. B. 137, 144. [See *O'Conner v. Townes*, 1 Texas, 107. A warranty given on the sale of a horse in the form "warranted sound for one month," was construed to mean a warranty that the horse was sound at the time of the sale, provided complaint of unsoundness was made within

one month. *Chapman v. Gwyther*, L. R. 1 Q. B. 463.]

(*i*) *Lester v. Garland*, 15 Ves. 247; per *Parke B. Webb v. Fairmanor*, 3 M. & W. 473, 476; per *Lord Tenterden, Pellew v. The Inhabitants of Wonford*, 9 B. & C. 134, 144.

(*k*) *Ib.*; *Pugh v. Duke of Leeds, Cowp.* 714; *Watson v. Pears*, 2 Camp. 294; [*Farwell v. Rogers*, 4 Cush. 460; *Oatman v. Walker*, 33 Maine, 71; *Winslow v. China*, 4 Greenl. 298; *Howes v. Smith*, 16 Maine, 181; *Ewing v. Bailey*, 4 Scam. 420; *Buttrick v. Holden*, 8 Cush. 233. So, the day of the act from which a future time is to be ascertained is to be excluded from the computation. *Weeks v. Hull*, 19 Conn. 376; *Blake v. Crowninshield*, 9 N. H. 304; *Woodbridge v. Bridgham*, 12 Mass. 403; *Henry v. Jones*, 8 Mass. 453; *Bigelow v. Wilson*, 1 Pick. 485; *Avery v. Stewart*, 2 Conn. 69; *Cornell v. Moulton*, 3 Denio, 12; *Aiken v. Appleby*, 1 Morris, 8; *Wiggin v. Peters*, 1 Met. 127, 129.

for in two months ; ” it was held that the vendee was to have two entire months in which to make the payment, exclusive of the day of sale. (*l*)

Where the performance is to take place one month from the *date* of an agreement, and there is a possible date, it must be executed accordingly ; and the month shall not be computed from the *making* of the contract, although part of the month had elapsed at the time the agreement was entered into. But if, in such a case, the *whole* of the month had elapsed when the agreement was made, it shall be intended that the parties meant the act to be done, within a month from the actual *making* of the agreement. (*l*¹) And so, the words, “ one month from the *making* hereof,” or “ from *henceforth*,” in an agreement, impliedly signify one month from the actual *execution*, and not one month from the date of the contract. (*m*)

So an agreement to pay a sum of money “ on the 29th day of *February* now next ensuing,” has been held to create an obligation to pay, on the 29th of February in the leap-year next after the date of the agreement. (*n*)

See *Judd v. Fulton*, 10 Barb. 117 ; *Bissell v. Bissell*, 11 Barb. 96 ; *Thomas v. Afflick*, 16 Penn. St. 14.]

(*l*) *Webb v. Fairman*, 3 M. & W. 473. [“ Between two days ” is exclusive of both. *Atkins v. Boylston*, F. & M. Ins. Co. 5 Met. 440 ; *Richardson v. Ford*, 14 Ill. 332 ; *Cook v. Gray*, 6 Ind. 335.]

(*l*¹) [A contract to complete a work, by a particular time, *e. g.* the month of November, means that it shall be done before that time. *Rankin v. Woodworth*, 3 Penn. St. 48 ; *Miller v. Phillips*, 31 Penn. St. 221. Where, by the terms of a contract, one party was to perform certain labor, and the other, in consideration thereof, was to pay a sum of money *in a certain month*, an action commenced *on the last day of that month*, is prematurely brought, and cannot be maintained, although the demand of the money had been made of the plaintiff on the same day before suing out the writ. *Harris v. Blen*, 16 Maine, 175. See *Savary v. Goe*, 3 Wash. C. C. 140. When a day or month is mentioned as antecedent or subsequent to a contract, and

the precise day or month is not specified, it means the time nearest to the date of the contract. *Whitney v. Crosby*, 3 Caines, 89. Where a note, dated 15th July, is payable immediately, with interest from the 1st day of June, the 1st of June next preceding is intended. *Whitney v. Crosby*, *supra*.]

(*m*) See *Styles v. Wardle*, 4 B. & C. 908. [Where a contract was dated *November 25*, 1848, conditioned to pay money, if, at the expiration of one year from the date, the party, to whom the money was to be paid, should perform a specified act, the doing of the act by him on the *26th day of November*, 1849, is a seasonable performance, and entitles him to the money. *Oatman v. Walker*, 33 Maine, 67.]

(*n*) *Chapman v. Beecham*, 3 Q. B. 723, 733. [“ Late in the month of May,” was construed to mean later than the 17th of May. *Erskine v. Erskine*, 13 N. H. 436. A contract was made for the sale of ten tuns of oil to be delivered to the purchaser within the last fourteen days of March ; the seller tendered the oil late on the 31st

Again : a contract must, in general, be performed strictly on the appointed day, (*n*¹) even although its non-performance may occasion a forfeiture. Thus, the acceptor of a bill of exchange contracts to pay it on the day it becomes due ; and the fact of his having tendered the amount after it became due, will afford no defence to an action thereon. (*o*)

But still, the right to insist upon such strict performance may be waived, if the party, on being informed that the contract cannot conveniently be performed until a future day, do not object to that day being substituted as the time for its completion. (*p*)

It must be borne in mind, however, that as regards contracts in writing under the statute of frauds, any alteration which is made in the time of performing the contract, must likewise be in writing. (*q*)

day of March, the buyer being at his warehouse at the time, and there being sufficient time before midnight for the buyer to examine, weigh, and receive the oil ; it was held that the seller had satisfied the contract on his part, although the jury found that by reason of the lateness it was an unreasonable time of day for the tender of the oil. *Startup v. Macdonald*, 6 Man. & G. 593, a case in which the subjects of tender and performance are very fully discussed.]

(*n*¹) [A person is not bound to perform an agreement on Sunday. *Delameter v. Miller*, 1 Cowen, 75. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance. *Salter v. Burt*, 20 Wend. 205 ; *Delameter v. Miller*, 1 Cowen, 75 ; *Anon.* 2 Hill, 375, note (*b*) ; *Avery v. Stewart*, 2 Conn. 69 ; *Sands v. Lyon*, 18 Conn. 18 ; *Link v. Clemmens*, 7 Blackf. 479 ; *Hammond v. Am. Ins. Co.* 10 Gray, 306. See *Kilgour v. Miles*, 6 Gill & J. 268 ; *Stead v. Dawber*, 10 Ad. & Ell. 57. Where a note payable in specific articles falls due on Sunday, a tender on the Monday follow-

ing is good. *Barrett v. Allen*, 10 Ohio, 426. See *Avery v. Stewart*, 2 Conn. 69. In *Stebbins v. Leowolf*, 3 Cush. 137, where a contract was made in New York, by parties resident in that state, and to be performed there, the court in Massachusetts held themselves bound by the rule established in New York as above stated, in *Salter v. Burt*, *supra*. But the court say : " There has not been an entire uniformity of decision, in the various judicial tribunals, as to the time of performance of a contract, when the day of maturity on the face of the contract falls on Sunday." 3 Cush. 144. As to the computation of time, where a statute declares that an act shall be done within a certain number of days, and the last of these falls on a Sunday, a different rule has prevailed. *Ex parte Dodge*, 7 Cowen, 147 ; *Alderman v. Phelps*, 15 Mass. 225.]

(*o*) *Poole v. Tumbridge*, 2 M. & W. 223 ; *Dobie v. Larkan*, 10 Exch. 776 ; *Hume v. Peploe*, 8 East, 167.

(*p*) *Carpenter v. Blandford*, 8 B. & C. 575. And see *Abbott v. Grosvenor Investment Company*, L. Rep. 3 Q. B. 123.

(*q*) See *Noble v. Ward*, L. Rep. 1 Ex 117 ; *S. C.* (in Cam. Scac.) 2 Ib. 135 *Eden v. Blake*, 13 M. & W. 614, 618.

And there are cases in which, although the contract appoints a future time for doing an act, the party who is to perform it may, even before the arrival of that time, subject himself to an action, by *disabling* himself from fulfilling his contract. Thus, where a party has disabled himself from making an estate which he has stipulated to convey at a future day, by executing a conveyance inconsistent with that estate, he commits a breach of his stipulation, and is liable to be sued before such day arrives. (*r*)

Cases in which a party may be sued before the day.

And so, where the plaintiff declared, on a contract by the defendant, to assign to the plaintiff all his interest in a term of years then held by him, on payment by the plaintiff, within seven years from a day named, of 140*l.*; and the breach was, that before the seven years had expired, the defendant assigned all his interest to a stranger; it was held, on special demurrer, that the breach, as laid, showed a good cause of action, — the defendant having incapacitated himself from performing his contract. (*s*)

So if, before the time for performing the contract arrives, the promiser *expressly renounce* the contract, the promisee may treat this as a breach of such contract, and may at once maintain an action in respect thereof. (*t*) But where the promisee has this option, he is bound to exercise it; and he cannot treat the renunciation as a breach if, after such renunciation, he insist upon holding the promiser to the prospective performance of his contract. (*u*)

But it is said, that if an act is to be performed at a future specified time, the contract is not broken, by the doing of something which may merely prevent the performance thereof in the mean time. (*x*)

(*r*) 1 Roll. Abr. 248, pl. 1; 8 Vin. Abr. 225; Co. Litt. 220 b; per Bayley J. in *Ford v. Tiley*, 6 B. & C. 325, 327. [See *Trask v. Vinton*, 20 Pick. 111; *Heard v. Bowers*, 23 Pick. 455; *McArthur v. Ladd*, 5 Ohio, 514; *Emmens v. Elderton*, 6 C. B. 160.]

(*s*) *Lovelock v. Franklyn*, 8 Q. B. 371.

(*t*) *Hochester v. De la Tour*, 2 E. & B. 678; *Avery v. Bowden*, 5 E. & B. 714, 728. And see per Willes J. *Wilkinson v. Verity*, L. Rep. 6 C. P. 206, 209; *Danube &c. Railway Company v. Xenos*, 11 C. B. N. S. 152; S. C. (in Cam. Scac.) 31 L. J. C. P. 284. It has been held that this

rule does not apply to the case of a promise to marry. *Frost v. Knight*, L. R. 5 Ex. 322. [See *Johnston v. Caulkins*, 1 John. Cas. 116. The breach of a contract to perform certain services within a stipulated time, is complete upon the arrival of the time to commence the performance, and the absolute refusal ever to fulfil the contract; and upon such refusal a suit may be instituted, and damages recovered for the non-performance of the whole contract. *Lamoreaux v. Rolfe*, 36 N. H. 33.]

(*u*) *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729, 744.

(*x*) Per Lord Denman, *Lovelock v.*

[The construction of contracts with regard to the time of performance is the same in equity and at law; but in some cases where a default is made in performance of the contract at the time appointed, which would operate as a breach of the contract at law, a court of equity will relieve against the legal consequences of such default, or grant a specific performance of the contract, notwithstanding the default, upon equitable terms; in such cases equity is said to consider the time as not of the essence of the contract. (x^1)

Thus in the ordinary case of the sale and purchase of an estate, in which a particular day is appointed for the completion of the purchase, courts of equity consider that the general object of the contract being only the sale of the estate for a given sum of money, the particular day named is not of the essence of the contract, and that the stipulation means, in substance, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case. (x^2)

At law, if upon the sale of an estate the contract is not *completed* in any point by the time appointed, there is a breach of the contract for which an action will lie, notwithstanding that the party in default may subsequently, and even before action brought, be able and willing to complete the contract. (x^3)

But in equity upon a bill for specific performance of a contract for the sale of land, the court directs an inquiry as to the title, and the vendor, on the one hand, is bound to make out a good title upon such inquiry, and, on the other, is not precluded from exacting performance, if he succeeds in then making a title, by reason of not having been able before to do so. (x^4)

Time is held to be of the essence of the contract in equity in cases of direct stipulation to that effect, as where the parties to the contract introduce a clause expressly stating that time is to be

Franklyn, 8 Q. B. 378. [See New Eng. Mut. Fire Ins. Co. v. Butler, 34 Maine, 451;] but see per Bayley J. Ford v. Tiley, 6 B. & C. 625, 628.

(x^1) [Lloyd v. Collett, 4 Ves. 690; 4 Bro. C. C. 469; Hipwell v. Knight, 1 You. & Coll. 415; Parkin v. Thorold, 16 Beav. 59; Roberts v. Berry, 3 De G., M. & G. (Am. ed.) 284, and note (1), 289, and note (1).]

(x^2) [Seton v. Slade, 7 Ves. 265; per Alderson B. Knight v. Hipwell, 1 Y. & C.

415; Radcliffe v. Warrington, 12 Ves. 326; Hearne v. Tenant, 13 Ves. 287; per Knight Bruce L. J. Wells v. Maxwell, 33 L. J. C. 44, 49; Roberts v. Berry, 16 Beav. 31; S. C. 3 De G., M. & G. 284.]

(x^3) [Wilde v. Fort, 4 Taunt. 334; Dobell v. Hutchinson, 3 Ad. & El. 355.]

(x^4) [Bennett College v. Carey, 3 Bro. C. C. 390; Jenkins v. Hiles, 6 Ves. 646; Wynn v. Morgan, 7 Ves. 202; Paton v. Rogers, 6 Madd. 256.]

of the essence of the contract; and it is also held to be of the essence of the contract where the circumstances of the case necessarily show it to be so, as where the matter of the contract is required for immediate use, or is of a terminable or fluctuating character, or value. (x^5)

By the conditions of sale of an estate, it was stipulated that all objections to the title should be sent in within twenty-eight days after the delivery of the abstract, and all objections not made within the same time should be considered as waived; it was held that the time mentioned was of the essence of the contract, although the condition did not expressly so stipulate. (x^6)

If no certain place is appointed for the performance of a contract, the promiser is bound at his peril to find the promisee within the time limited, if he be within the four seas, Place of performance. in order to complete the performance. (x^7)

But the duty of the debtor to seek the creditor, in order to pay him, where no particular place is agreed upon for payment, continues only whilst the creditor remains within the realm of England; the debtor is not bound to go abroad to seek his creditor, and if the creditor by going abroad prevents the tender being made to him, the debtor is excused. (x^8)

But in the case of a foreign contract, the performance of which is not so restricted, the fact of the creditor being abroad is no excuse for the debtor not tendering to him the performance which he has stipulated for.] (x^9)

4. With regard to giving *notice* of any fact, on the occurrence of which the right to claim performance of a contract may depend, the general rule is, that where the matter does Notice, when necessary.

(x^5) [Parkin v. Thorold, 16 Beav. 59; up v. Macdonald, 6 Man. & G. 593, 624; Earl Darnley v. London, Chatham & Dover Railway Co. 33 L. J. C. 9; Macbryde v. Weekes, 22 Beav. 533; Lord Ranelagh v. Melton, 34 L. J. Ch. 227; Dresel v. Jordan, 104 Mass. 415; Barnard v. Lee, 97 Mass. 92; Richmond v. Gray, 3 Allen, 25; 1 Sugden V. & P. (8th Am. ed.) 264, notes (a^1) and (b^1), 268, and note (e), and cases cited and stated.]

(x^6) [Oakden v. Pike, 34 L. J. Ch. 620.]

(x^7) [Shepp. Touch. 136, 378; Kidwelly v. Brand, Plowd. 71; per Parke B. Start-

up v. Macdonald, 6 Man. & G. 593, 624; Haldane v. Johnson, 8 Exch. 689; Reynolds v. Davis, 1 B. & P. 625; Turner v. Hayden, 4 B. & C. 1; per Parke B. Poole v. Tumbridge, 2 M. & W. 223, 225; Price v. Price, 16 M. & W. 232, 242.]

(x^8) [Co. Litt. 210 b.; Shepp. Touch. 378; and see Fessard v. Mugnier, 18 C. B. N. S. 286.]

(x^9) Fessard v. Mugnier, 18 C. B. N. S. 286. See Bixby v. Whitney, 5 Greenl. 192.]

not lie more properly within the knowledge of one of the parties than of the other, such notice is not requisite, unless the contract contain an express stipulation to that effect. (*y*) Thus, if a man engage to do a thing on the performance of some act by a stranger, or upon a stranger attaining the age of twenty-one years or dying; notice of these events need not be alleged; for they lie in the defendant's knowledge as much as in that of the plaintiff, and he ought to take notice thereof at his peril. (*z*) So, if A. be bound to indemnify B. against the acts of a third person, the liability attaches without notice of such acts from B. to A. (*a*)

And where a specific act is to be done by a third party named, or even by the obligee himself, there notice is not requisite. (*b*)

But where a contract is to be performed "upon notice," or "one month after notice," it is necessary to give such notice. (*b*¹)

So, where a party contracts to do a thing, but the act on which the right to demand performance of the contract is to arise, is indefinite, the defendant is entitled to notice before he can be called on to perform it. (*c*) Thus, if the promise were to pay the plaintiff so much "as another person had given him for similar goods;" or "to pay him the amount of damages he had sustained by a battery," or the like; notice of the amount the plaintiff had received from the third party, or of the extent of the injury which he had suffered, would be necessary. (*d*) And it is said that, in general, where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given. (*e*)

(*y*) 2 Wms. Saund. 62 a, note (4); per Parke B. Dawson v. Wrench, 3 Exch. 359, 362; Vyse v. Wakefield, 6 M. & W. 442, 453; Child v. Horden, 2 Bulst. 144; [Watson v. Walker, 23 N. H. 471; Lent v. Paddleford, 10 Mass. 230, 238. In Tasker v. Bartlett, 5 Cush. 359, 364, Mr. Justice Wilde states it as a well-known principle, "that where one party has knowledge of a material fact, not known to the other party, he is bound to give notice of it."]

(*z*) Harris v. Ferrand, Hardr. 42; 2 Wms. Saund. 62 a, note (4); Gable v. Moss, 1 Bulst. 44; Clarke v. Child, 4 Freem. 254.

(*a*) Cutler v. Sothorn, 1 Wms. Saund. 116; Lilley v. Hewitt, 11 Price, 494.

(*b*) Per Parke B. Vyse v. Wakefield, 6 M. & W. 442, 454.

(*b*¹) [Hodsdon v. Harridge, 2 Wms. Saund. 62 a, note (4); Child v. Horden, 2 Bulst. 144; Quarles v. George, 23 Pick. 400.]

(*c*) Per Parke B. Vyse v. Wakefield, 6 M. & W. 442, 454; Haule v. Hemyng Cro. Jac. 422; [Watson v. Walker, 23 N. H. 471. See Warren v. Wheeler, 21 Maine, 484; Doogood v. Rose, 9 C. B. 132; 1 Chitty Pl. (9th Am. ed.) 327, 328; 2 Greenl. Ev. § 228; Newcomb v. Cramer, 9 Barb. 402.]

(*d*) 1 Chit. Pl. 6th ed. 328.

(*e*) Per Parke B. Vyse v. Wakefield, 6 M. & W. 442, 454.

Notice by the holder of a bill or note, to the drawer or indorser of the former, or to the indorser of the latter, of the non-payment thereof by the acceptor or maker, is required by the law merchant. But the acceptor of a bill or the maker of a note, which is made payable at a banker's, is not, in general, entitled to notice that it was dishonored on presentment at such banker's; because it is the duty of such a party to see that the money is ready on the presentment of the instrument. (*f*)

And a reasonable notice may sometimes be impliedly requisite, from the nature of the particular case. Thus it has been held, that a theatrical performer who was called on, in consequence of the illness of another actor, to resume a part in which he had acquired celebrity, was entitled to reasonable notice, before the time when the required performance was to take place; although the contract by which he was engaged contained no stipulation that such notice should be given. (*g*)

Unless there be an express stipulation in the contract, (*g*¹) or it be requisite from the peculiar nature thereof, that a *request* or *demand* of performance shall be made, (*g*²) such request or demand is not essential to complete the cause

Request to 'perform, when necessary.

(*f*) *Turner v. Hayden*, 4 B. & C. 1.

(*g*) *Graddon v. Price*, 2 C. & P. 610.

[If a person contract to do a thing on demand, or on notice, he will be entitled to a reasonable time, in which to do the thing, after a demand made or notice given. See *Baker v. Mair*, 12 Mass. 121; *Newcomb v. Bracket*, 16 Mass. 161; *Eames v. Savage*, 14 Mass. 425. On an agreement on the 22d of August, to deliver a quantity of property between the 1st of October and the 1st of December, to be paid for on delivery at a certain place, with liberty to the vendee to have the quantity increased on giving reasonable notice; held, that the vendee was bound to give the notice before the 1st of October, and prove that he was ready to pay for the increased quantity. *Topping v. Root*, 5 Cowen, 404. A party who has contracted to deliver specific articles on demand, should always be ready to deliver them at his dwelling-house or place of business; and if he be absent, a demand at his dwelling-house will be sufficient. *Mason v.*

Briggs, 16 Mass. 453. See *Rice v. Churchill*, 2 Denio, 145.]

(*g*¹) [Where two defendants had received payment in full for a tract of land, and had given bond to the plaintiff conditioned that they should, "in a reasonable time after request, make and execute to the plaintiff, or his assigns, a good and sufficient deed to convey the title to said premises," a request for the deed may be good, without the production of the bond at the time. *Hill v. Hobart*, 16 Maine, 164. The making of a subsequent demand is no waiver of a prior one. *Ib.* Where several jointly undertake the custody of goods, and promise to deliver them on demand, it is enough to demand them of one of the bailees, and on his refusal an action lies. *Griswold v. Plumb*, 3 Mass. 298; *M'Farland v. Crary*, 8 Cowen, 253.]

(*g*²) [Where no time is fixed in the contract, or by other agreement between the parties, either express or implied, for the doing of a thing, a request is essential to the cause of action. *Boody v. Rut.* &

of action ; (*h*) but the party is bound to perform his contract without being required so to do, — as in the common case of a contract to pay a sum of money, generally, or upon a certain day. (*i*)

And accordingly, the opinion attributed to Buller J. in the report of the case of *Bach v. Owen*, (*k*) — namely, that, in the case of an agreement between A. and B. to exchange horses, the plaintiff was bound to show that he requested the defendant to deliver the horse, which he, the plaintiff, was to receive, — cannot, as it seems, be regarded as correct ; except on the supposition that the contract really was to deliver on request. (*l*)

So, even where the contract is to deliver goods on request at a certain price, the vendee need only aver and prove a request to deliver and a readiness to pay the price, without showing that it was *tendered*. (*m*)

Burling. R. R. Co. 24 Vt. 660. A note given by one who keeps a saw-mill and lumber yard, for an amount "payable in lumber at cash prices when called for," without mentioning any day or place of payment, is payable on demand at the mill-yard, and a special demand must be made there before suit brought. *Rice v. Churchill*, 2 Denio, 145. But a personal demand of the maker elsewhere, would be good, unless met by an offer to pay at the yard. In such case, the holder would be bound to go to the yard to receive payment. Per Beardsley J. in *Rice v. Churchill*, 2 Denio, 145. A demand at the mill-yard is sufficient, though neither the maker nor any one authorized to make the payment be found there. If the maker is absent, it may be made of any one in charge of the yard ; and if there be no such person, it may be made publicly. *Ib.* The maker of such an engagement is bound to be at the place of payment, at all reasonable hours, prepared to perform the agreement. *Ib.* Where a certain time is fixed for the delivery of ponderous articles, no demand is necessary to put the debtor in default, though he may defend himself against the action by proving his readiness on that day. *Sorrell v. Craig*, 8 Ala. 567. Where specific articles are to be delivered at a particular place other than the residence of the promisee, it is the duty

of the promisor, after making delivery at that place, to notify the promisee thereof without delay. *Newcomb v. Cramer*, 9 Barb. 402.]

(*h*) Per Lord Abinger, *Radford v. Smith*, 3 M. & W. 254, 258. See instances, *Hooper v. Woolmer*, 10 C. B. 370 ; 1 Chit. Pl. 6th ed. 330. If a note be payable so long *after sight* ; *Holmes v. Kerri-son*, 2 Taunt. 323 ; or *after demand*, see *Thorpe v. Booth*, R. & M. 388 ; a presentment or demand is necessary ; *aliter*, as against the maker of a note payable generally *on demand* ; *Norton v. Ellam*, 2 M. & W. 461 ; *Christie v. Fonsick*, Selw. N. P. 8th ed. 141, 352.

(*i*) *Gibbs v. Southam*, 5 B. & Ad. 911. [See *Ruggles v. Patten*, 8 Mass. 480 ; *Carey v. Vance*, 17 Mass. 389. A cause of action arises at once, and no formal demand is necessary, when an obligation to pay is complete. *Watson v. Walker*, 23 N. H. 471, 493.]

(*k*) 5 T. R. 409.

(*l*) Per Lord Abinger and Parke B. *Radford v. Smith*, 3 M. & W. 254, 258, 259.

(*m*) *Rawson v. Johnson*, 1 East, 203 ; 1 Wms. Saund, 820 e, note (5). [See *White v. Mann*, 26 Maine, 361, 367, 368 ; *Biggers v. Pace*, 5 Geo. 171. And even where a tender is necessary, it is sufficient for the party to show that he has made as com-

And clearly, where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand of performance. (*n*)

But an action does not lie against an agent for not accounting, until after a demand made of an account. (*o*) And so, before suing a surety for not paying the balance of accounts between the principal and the creditor, a request to pay would seem to be proper. (*p*)

5. *First*. If a man contract to do a thing which is absolutely impossible, such contract will not bind him, because no man can be obliged to perform an impossibility. (*q*) Excuses for non-performance in general. Thus, an action will not lie on a contract by C., to pay a sum of money to A., B., and himself C., or the survivors or survivor of them, on their joint account. (*r*)

So, if there be an agreement to do an act — *e. g.* to deliver goods

plete a tender as he could make under the circumstances. *White v. Mann*, 26 Maine, 361.]

(*n*) *Lovelock v. Franklyn*, 8 Q. B. 371; *Short v. Stone*, *Ib.* 358; per *Pollock C. B.* *Caines v. Smith*, 15 M. & W. 189, 190.

(*o*) *Topham v. Braddick*, 1 Taunt. 572.

(*p*) At all events, a surety is entitled to a demand where he has engaged to pay "on request;" *Sicklemore v. Thistleton*, 6 M. & S. 9; *Lilley v. Hewitt*, 11 Price, 494. But if there be no such stipulation, and the contract be, that the money shall be paid at the creditor's house on a fixed day, no request need be made. *Rede v. Farr*, 6 M. & S. 121, 125.

(*q*) See *Pothier Traité des Obligations*, c. 1, s. 4. [It must be impossibility, not difficulty, merely, that will excuse a party from the performance of an agreement. *Hulings v. Craig*, *Addis.* 342. What may be called practical impossibility is placed on the same footing in law with absolute impossibility. It has been thus described: In matters of business a thing is said to be impossible when "it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep

water; though it might be possible, by some very expensive contrivance, to recover it." Per *Maule J.* in *Moss v. Smith*, 9 C. B. 94, 103; cited by *Cresswell J. C.* *W—— v. H——*, 30 L. J. P. & M. 73, 74. Whether a promise is reasonable or not, provided it be reasonably practicable, is immaterial. "When a person enters into a contract, he is bound to perform it, whether reasonable or not. An obligation imposed by law is necessarily both reasonable and practicable; but a person may undertake by agreement to do any particular act, and, if it is not reasonable, it is his own fault for entering into such a contract. Per *Rolfe B.* *Vyse v. Wakefield*, 6 M. & W. 442, 456. A promise must, however, be reasonably certain; if the parties have expressed themselves in their agreement in such uncertain terms that it is impossible to give them any definite meaning, the agreement is necessarily void. *Guthing v. Lynn*, 2 B. & Ad. 232; per *Lord Tenterden C. J.* in *Coles v. Hulme*, 8 B. & C. 568, 573; per *Alderson B.* in *Grant v. Maddox*, 15 M. & W. 737, 743; *Alder v. Boyle*, 4 C. B. 635.]

(*r*) *Faulkner v. Lowe*, 2 Exch. 595. But a man may assign personalty to others and himself. 22 & 23 Vict. c. 35, s. 21.

to a vendee — on a certain condition ; and the condition, without any default of the vendor, never comes to pass, he will not be liable for their non-delivery. (*s*)

Secondly. But where the contract is to do a thing which is possible in itself ; or where it is conditioned on an event which happens ; the promiser will be liable for a breach thereof, notwithstanding it was beyond his power to perform it ; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. (*t*) And, therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of the party. (*u*)

Thus, if a lessee covenant to repair, or to pay rent, he is not discharged by the destruction of, or injury to the premises by fire ; or by the act of God, as by lightning, flood, or tempest ; or by the queen's enemies. (*x*) So, if the charterer of a ship covenant to

(*s*) *Hale v. Rawson*, 4 C. B. N. S. 85, 95.

(*t*) *Ib.*

(*u*) *Jervis v. Tomkinson*, 1 H. & N. 195, 208 ; *Hills v. Sughrue*, 15 M. & W. 253 ; *Marquis of Bute v. Thompson*, 13 M. & W. 487 ; *Paradine v. Jane, Aleyn*, 27 ; and see *Kirk v. Gibbs*, 1 H. & N. 810 ; *Brown v. Royal Insurance Society*, 1 E. & E. 853 ; 28 L. J. Q. B. 275 ; per Lord Ellenborough C. J. *Atkinson v. Ritchie*, 10 East, 533 ; *Com. Dig. Action upon the Case upon Assumpsit (G.)* ; *Bullock v. Dommitt*, 6 T. R. 650 ; *Hadley v. Clark*, 8 T. R. 659 ; [*Oakley v. Morton*, 1 Kernan (N. Y.), 25 ; *Harmony v. Bingham*, 2 Kernan (N. Y.), 107, 108 ; *Davis v. Smith*, 15 Misson. 467 ; *Lord v. Wheeler*, 1 Gray, 282 ; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530 ; *Ryan v. Dayton*, 25 Conn. 194. It is not a valid excuse for the non-performance of an agreement to deliver goods of a certain quality, that goods of that quality were not to be had at the particular season when the contract was to be executed. *Gilpins v. Consequa*, 1 Peters C. C. 91 ; *Youqua v. Nixon*, 1 Peters C. C. 221. So, in general, the sickness and consequent absence of a party is no excuse for the non-performance of his contract. *Alexander v. Smith*, 4 Dev. 364.

But if the contract be for the performance of an act, which the party, promising to do it, alone is competent to perform, and he is prevented by the act of God from performing it, the obligation is discharged. *Knight v. Bean*, 22 Maine, 531 ; *Dickey v. Linscott*, 20 Maine, 453. The obligation to perform a contract for work and labor is not annulled, because it is ascertained before the work is begun, that it is unnecessary or useless, nor because the employer cannot determine how he will have it done. *Graves v. Carruthers*, 1 Meigs, 58.]

(*x*) *Izon v. Gorton*, 7 Scott, 537 ; *Paradine v. Jane, Aleyn*, 27 ; *Bullock v. Dommitt*, 6 T. R. 650 ; *Brecknock Company v. Pritchard*, 6 T. R. 750 ; *Baker v. Holtzapffel*, 4 Taunt. 45 ; and see *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 121 ; [*Re Skingley*, 3 Mac. & G. 221. The phrase, "impossibility arising by the act of God," is used on some occasions as denoting a kind of impossibility having peculiar incidents and consequences. See Co. Litt. 206 a ; *Laughter's case*, 5 Co. Rep. 21 b ; *Cro. Eliz.* 398 ; *Greningham v. Ewer*, *Cro. Eliz.* 396 ; *Williams v. Lloyd*, Sir W. Jones, 179. Certain accidents, as death, tempests, &c., seemed to be intended by the phrase. It is obvious, however, that all such accidents

send a cargo alongside at a foreign port, he is liable if he omit to do so ; although all intercourse with such port were forbidden by law, in consequence of the prevalence of an infectious disorder. (*y*) So, where the defendant agreed to load a ship with a cargo of coals, "to be loaded with usual dispatch;" and, by reason of a severe frost, he was prevented from bringing the coals alongside the ship, whereby she was detained ; he was held to be liable for such detention. (*z*) So, if a man covenant to deliver goods at London, the loss of the boat by tempest will not excuse him. (*a*) So, it is no defence to an action on a charter-party, for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade ; at least if, at the time the charter-party was made, the blockade had been publicly notified to the English government, so that the defendant must be taken to have been aware of it. (*b*)

So, where the purchaser of a house agreed to pay a certain sum in addition to the purchase-money, provided the pavement in front of the adjoining houses should be laid down by a specified time ; it was held that, inasmuch as the pavement was not laid down by that time, he could not be called upon to pay the money, although the delay was occasioned by the badness of the weather. (*c*)

And where the lessee in a coal lease, covenanted to pay a certain proportion of the value of the coals to be raised, unless prevented by *unavoidable accident* from working the pit ; it was held, that if the accident were of such a nature, that to work the pit was not physically impossible, but such working might have been ef-

are referable to natural and not to supernatural causes, and therefore they are all events which, though beyond the control, are within the possible contemplation of the parties, and might be, and often are, provided for in their agreement. The contract of a carrier, by the common law, insures the goods carried, except against two events : namely, the act of God and the king's enemies, "both," it is said, "so well known to all the country where they happen, that no person would be so rash as to attempt to prove that they had happened when they had not." *Riley v. Horne*, 5 Bing. 217, 220 ; and see *Coggs v. Barnard*, 1 Smith L. C. 5th ed. 171 ; *Forward v. Pittard*, 1 T. R. 27. The specific events, however, excepted from the

carrier's insurance, as being acts of God, must be ascertained from the decisions respecting them. See *Chitty & Temple on Carriers*, 36 ; *Powell on Carriers*, 73 ; and see *Forward v. Pittard*, 1 T. R. 27, 33 ; *Briddon v. Great Northern Railway Co.* 28 L. J. Exch. 51 ; *Taylor v. Great Northern Railway Co.* L. R. 1 C. P. 385 ; 35 L. J. C. P. 210.]

(*y*) *Barker v. Hodgson*, 3 M. & S. 267.

(*z*) *Kearon v. Pearson*, 7 H. & N. 386.

(*a*) *Thompson v. Miles*, 7 T. R. 384 ; and see *Pope v. Bavidge*, 10 Exch. 73.

(*b*) *Medeiros v. Hill*, 8 Bing. 231. [See *Vanderslice v. Newton*, 4 Comst. 130.]

(*c*) *Maryon v. Carter*, 4 C. & P. 295.

fected, although at an expense greater than the value of the coals to be raised, the defendant was liable. (*d*)

But in contracts from the nature of which it is apparent, that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied, that if the performance become impossible from the perishing of the person or thing, that shall excuse such performance. (*e*)

Thirdly. The non-performance of a contract will be excused where performance is rendered impossible by act of law. (*f*) And

(*d*) *Morris v. Smith*, 3 Dougl. 279.

(*e*) *Taylor v. Caldwell*, 3 B. & S. 826, 839. [Upon the sale of a cargo of goods, which at the time of the sale was supposed to be on its voyage, but which, unknown to both parties, had been then entirely lost, it was held that the contract imputed the condition that the ship or goods were then in existence. *Couturier v. Hastie*, 9 Exch. 102; S. C. 5 H. L. Cas. 673. Upon the sale of a ship the vendor covenanted that he had then power to sell the ship; it was held that the covenant was not conditional upon the existence of the ship, and would be broken if the ship had ceased to exist at the time of the sale, although both parties might have been ignorant of it. *Barr v. Gibson*, 3 M. & W. 390. So, the sale of a life annuity was held to be conditional upon the annuitant being alive at the time of the sale; and the life having in fact ceased before the contract was made, it was held to be void and the purchase-money recoverable. *Strickland v. Turner*, 7 Exch. 208. The renewal of an insurance of a life was held to be conditional upon the insured being then alive, and he being then dead, though unknown to the parties, it was held void. *Pritchard v. Merchants' Life Assurance Soc.* 3 C. B. N. S. 622. The plaintiff made a charter-party with the defendant, by which it was agreed that the plaintiff's ship should proceed to a port named, or so near thereto as she could safely get, and there load a full cargo, with which she was to sail, the cargo to be loaded at the merchant's risk and expense. The ship having received the cargo on board, it was found impossible

for it, when laden, to cross the bar of the port, of which neither party was previously aware; the captain thereupon landed part of the cargo, and required the defendant to reshipe it outside the bar, which he refused to do, and the ship sailed with only a part of the cargo; it was held that the plaintiff had no claim for the whole freight, nor for damages from the defendant for refusing to ship a full cargo. *General Steam Navigation Co. v. Slipper*, 11 C. B. N. S. 493; 31 L. J. C. P. 185. If the plaintiff had been aware that the ship could not cross the bar with the cargo on board, he might have, in the first instance, demanded the cargo to be shipped outside, being as near as the ship could safely get to the port for the purpose of the voyage. *Shield v. Wilkins*, 5 Exch. 304.]

(*f*) Per Cur. *Doe d. Lord Anglesea v. Churchwardens of Rugeley*, 6 Q. B. 107, 114; and see *Bailey v. De Crespigny*, L. R. 4 Q. B. 180; *Brown v. Mayor &c. of London*, 9 C. B. N. S. 726; S. C. (in Cam. Scac.) 13 Ib. 828; *Wynn v. Shropshire Union Railway Company*, 5 Exch. 420, 440; *Davis v. Cary*, 15 Q. B. 418, 425; [*Chancy v. Overman*, 1 Dev. & Bat. 402; *Stone v. Dennis*, 3 Porter, 231. See the *American Jurist*, Oct. 1833, art. iii. p. 251, for an able disquisition on the principle of the case of *Paradine v. Jane*, Aleyn, 26, and on the questions that arise where the complete performance of a contract is prevented by an act of the government. This article will well repay the trouble of a perusal. Where, by the terms of a contract for work and labor, the full price is not to be paid until the work is completed,

the rule on this subject has been thus stated: "the difference where an act of parliament will amount to a repeal of a covenant, and where not, is this: where a man covenanted not to do a thing which it was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant; and *vice versa*; but where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant." (g)

So, the non-performance of a contract will be excused, where such non-performance is occasioned by an act done by public authority. (h) And although it seems that, in general, the non-performance of a contract, absolute in its terms, will not be excused, because performance thereof has been rendered impossible by the act of God; (i) yet there are cases in which — on the principle laid down in *Taylor v. Caldwell* (j) — this will be implied as a condition of the contract. *E. g.* if there be a covenant for personal service, and the performance thereof be prevented by the act of God, as by the illness or death of the servant, that will excuse

and a complete performance becomes impossible by the act of the law, the contractor may recover for the full value of the labor actually done at the prices agreed upon. *Jones v. Judd*, 4 Comst. 412. If one agrees not to do a thing which it is lawful for him to do, and a subsequent act of the legislature compels him to do it, the act repeals the agreement, and *vice versa*. *Brick Pres. Church v. New York*, 5 Cowen, 538. But where one agrees not to do a thing, which is at the time unlawful, a subsequent act of the legislature, making it lawful, does not repeal the agreement. *Ib.* The laws of the United States laying an embargo for an unlimited time, afterwards repealed, did not extinguish a promise to deliver debentures, but operated a suspension only during the continuance of those laws. *Baylies v. Fettyplace*, 7 Mass. 325. See *Harrington v. Dennie*, 13 Mass. 94.]

(g) Per *Holt C. J.* *Brewster v. Kitchin*, 1 Ld. Raym. 317, 321: citing *Dyer*, 27, pl. 178, 186, 187, 188; and 48, pl. 5; and see *Touteng v. Hubbard*, 3 B. & P. 301; *Jaques v. Withy*, 1 H. Bl. 65; *Barker v.*

Hodgson, 3 M. & S. 270; [*Brick Pres. Church v. New York*, 5 Cowen, 538.]

(h) *Melville v. De Wolf*, 4 E. & B. 844, 850; *Esposito v. Bowden*, *Ib.* 963, 976; *S. C.* (in *Cam. Scac.*) 7 E. & B. 763.

(i) Per *Willes J.* delivering the judgment of the court of exchequer chamber, *Lloyd v. Guibert*, L. Rep. 1 Q. B. 115, 121; per *Martin B.* *Ford v. Cotesworth*, L. R. 5 Q. B. 544, 547. If a condition, which was possible at the making thereof, became impossible by the act of God, the obligation is discharged. See *Shep. Touch.* 382; *Bac. Abr. Conditions (Q.)*; *Cro. Eliz.* 396, 398; *Co. Litt.* 206 a; [*Leonard v. Dyer*, 26 Conn. 177, 179. The rule, that if a thing become physically impossible to be done, by the act of God, performance is excused, does not avail where the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused. *White v. Mann*, 26 Maine, 361; *Chapman v. Dalton*, *Plowden*, 284; *Holtham v. Ryland*, 1 Eq. Cas. Abr. 18.]

(j) 3 B. & S. 826, 839.

the non-performance of the covenant. (*k*) And so it is said, that

(*k*) *Boast v. Frith*, L. R. 4 C. P. 1. [If there be a stipulation for the performance of an act, which the promisor alone is competent to perform, the obligation is discharged, if he is prevented by the act of God from performing it; as if one man should agree to work for another for a specified time, and should fall sick or die before the expiration of the period agreed upon, the obligation would be discharged. So, if one person should agree to wait and tend upon another personally for a year, and the person to be waited and tended upon should die before the expiration of the time, the promisor would be absolved from his undertaking. *Knight v. Bean*, 22 Maine, 531, 536; *Dickey v. Linscott*, 20 Maine, 453; *Fuller v. Brown*, 11 Met. 440; *Ryan v. Dayton*, 25 Conn. 188; *Lakeman v. Pollard*, 43 Maine, 463. So, where a party promised to redeliver a borrowed horse on request, and the horse died without his default, it was held that he was not liable. *Williams v. Lloyd*, Sir W. Jones, 179; *S. C. nom. Williams v. Hill*, Palm. 548. In these and like cases the court will hold that the parties did not understand that performance would be required, unless the life of the person in the one case, or of the horse in the other, was continued, so that performance would be possible. Per Ellsworth J. in *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 535, 536. In this case a party agreed to build and complete a school-house by a certain time, and before that time arrived, and when he had nearly completed the building, it was destroyed by lightning, whereby alone he was prevented from performing his contract, which was absolute in its terms. This destruction of the building was held not to excuse the non-performance of the contract. The learned judge (Ellsworth) who delivered the opinion of the court, said: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done or the

event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of this character), will be found, we think, to grow out of the mode of construing the contract or of affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself." "It is said, however, that there is one real exception to the rule, viz.: where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case, which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law." See per Storrs J. in *Ryan v. Dayton*, 25 Conn. 194. So, in *Adam's v. Nichols*, 19 Pick. 275, the court most fully recognized the rule that the act of God will not operate to discharge a promise which is absolute and unqualified in its terms, though the contingency is beyond the power of the contractor. So, also, in *Boyle v. Agawam Canal Co.* 22 Pick. 381; *Lord v. Wheeler*, 1 Gray, 282. See *Brumley v. Smith*, 3 Ala. (N. S.) 123; *Clark v. Franklin*, 7 Leigh, 1; *Wilson v. Knott*, 3 Humph. 473. In *Harmony v. Bingham*, 2 Kernan (N. Y.), 106, the same principle is laid down, that "where a party engages

if one covenant to leave a wood in the same plight as he finds it, and some of the trees be blown down by the wind, the covenant is not broken; for it is now become impossible to be done by the act of God, and in this case the covenantor is not bound to supply it. (*l*)

Fourthly. If a man contract to do an act, in consideration that another has contracted to do certain things on his part; and it should turn out, before anything is done under the contract, that the latter is unable to do what he has engaged to do, the contract is at an end. (*m*)

Fifthly. But where the performance of the contract is rendered impossible, by the act of the party who is chargeable thereon, such impossibility affords no answer to an action on the contract. (*n*)

And in all cases in which the non-performance of a contract is attempted to be excused, on the ground of the performance thereof having been impossible, the fact of its having been impossible must be clearly established. (*o*)

Sixthly. The non-performance of one part of a contract is not excused, by showing performance of another part thereof. And accordingly, where the defendant contracted to make and deliver to the plaintiff a quantity of iron rails of a certain quality; a plea which stated that the rails were, by the contract, to be inspected, before delivery, by an agent of the plaintiff, who was to be at liberty to approve and accept such of them as he should think fit; and that the rails in question were accordingly so inspected and approved, and accepted in performance of the contract by the agent of the plaintiff, was held bad, — inasmuch as evidence of approval and acceptance by the inspector, would afford no proof of the performance of the stipulation as to quality. (*p*)

Seventhly. If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this, of itself, does not amount to a breach thereof. (*q*) But if such expres-

unconditionally by express contract to do an act, performance is not excused by inevitable accident, or other unforeseen contingency, not within his control.”]

(*l*) Shep. Touch. 173.

(*m*) Per Cur. Chanter *v.* Leese, 4 M. & W. 295, 311; and see Partridge *v.* Sowerby, 3 B. & P. 172.

(*n*) Per Cur. Beswick *v.* Swindells (in Cam. Scac.), 3 A. & E. 868, 883.

(*o*) See Tuffnell *v.* Constable, 7 A. & E. 798.

(*p*) Bird *v.* Smith, 12 Q. B. 786; 12 Jur. 916.

(*q*) *Aliter*, if he expressly renounce the contract. Hochster *v.* De la Tour, 2 E. & B. 678.

sion of intention remain unretracted, when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance. (*r*)

Eighthly. It is also a general rule, that an *entire* contract cannot be *apportioned*. (*s*) So that, if a party undertake to complete a certain act, which is entire or indivisible, before his claim to remuneration is to accrue; he cannot recover for a *partial* performance, although the completion of the act was prevented by inevitable accident. (*s*¹)

Thus, where a sailor was to be paid a certain sum, if he proceeded and continued, and did his duty on a voyage; and he died before the voyage was completed; it was held, that his executor had no claim to any part of his wages (*t*) So, if there be a cov-

(*r*) *Ripley v. M'Lure*, 4 Exch. 345, 359; 18 L. J. Exch. 419; and see *Xenos v. Danube &c. Railway Co.* 11 C. B. N. S. 152; 13 Ib. 825; *Cort v. Ambergate &c. Railway Co.* 17 Q. B. 127; 20 L. J. Q. B. 460, 466; *Philpotts v. Evans*, 5 M. & W. 475, 477. [See *De Peyster v. Pulver*, 3 Barb. 284. On a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as the purchaser has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the supply, such vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. And proof of such notice by the purchaser will entitle the plaintiff to recover on a count alleging that he was ready and willing to perform the contract, and that the purchaser refused to accept the residue of the goods, and *prevented and discharged* plaintiff from supplying them, and from further executing the contract. Such notice is a *prevention*, though there is no other act of obstruction. And the jury should give such damages in the case as would leave the plaintiff in the same situation as if the purchaser had fulfilled his contract. *Cort v. Ambergate &c. Rail-*

way Co. supra; *Hochster v. De la Tour*, 2 El. & Bl. 678; *Smith v. Lewis*, 24 Conn. 624. Where one was bound to deliver a deed on a certain day, and at the day was ready with the deed, and would have tendered it but for the evasion of the other party; this was held to be equivalent to a tender. *Borden v. Borden*, 5 Mass. 67. See *Whitney v. Spencer*, 4 Cowen, 39; *Goodwin v. Holbrook*, 4 Wend. 377; *People v. Bartlett*, 3 Hill (N. Y.), 570.]

(*s*) See *Chanter v. Leese*, 4 M. & W. 295, 311; and in general, 3 Vin. Abr. tit. *Apportionment*; 2 Pothier, by Evans, 44. [The difference between *entire* and *divisible* contracts was considered by Woodward J. in *Logan v. Caffrey*, 30 Penn. St. 196. See *Hill v. Rewee*, 11 Met. 268; *Miner v. Bradley*, 22 Pick. 457; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Clark v. Baker*, 5 Met. 452; *Parish v. Stone*, 14 Pick. 198; *Brooks v. Byam*, 2 Story, 525.]

(*s*¹) [*McMullen v. Kelso*, 4 Texas, 235. See *Leonard v. Dyer*, 26 Conn. 172.]

(*t*) *Cutter v. Powell*, 6 T. R. 320; *Appleby v. Dods*, 8 East, 300; *Hulle v. Heightman*, 2 East, 145; and see *Jesse v. Roy*, 1 Cr., M. & R. 316, 340. [Passage money, paid in advance, may be recovered back on the breaking up of the voyage by a peril of the sea, and the failure of the ship-owner to send the passenger to his destination. *Brown v. Harris*, 2 Gray, 360. But in ordinary contracts for labor,

enant in a charter-party, to pay freight "on the goods being delivered at B.;" and the goods are carried to A., where the ship is wrecked; freight, *pro rata itineris*, cannot be recovered in an action on the charter-party, although the defendant accept the goods at A. (*u*) So, if a landlord accepted the surrender of a tenancy in the middle of a quarter, without any new agreement as to an apportionment of the quarter's rent, he could not, at the common law, recover any part of it. (*x*) And so, where a tenant is evicted by his landlord from part of premises let at an entire rent, such eviction will afford a complete defence to an action for the use and occupation of those premises. (*y*)

We have seen, however, that although a partial remuneration for the part performance of an entire contract cannot, in general, be recovered, yet a claim may sometimes arise upon a *quantum meruit*, by reason of the party who is to make the payment, accepting and retaining the benefit of the partial performance, after the time for completing the contract has elapsed. (*z*)

So it has been held that if the tenant, after a partial eviction, continue in possession of the residue of the premises, he will be liable for the rent of that portion. (*a*) But this decision is at variance with the older authorities. (*b*) And the true rule would seem to be, that where a lessor enters upon a lessee in part, no apportionment of the rent will take place, except where the lessor enters lawfully, as upon a surrender, forfeiture, or the like. (*c*)

serious sickness releases the laborer, and no mutual obligation longer existing between the parties, the laborer may recover the benefit which his employer derived from his partial performance. *Hubbard v. Belden*, 27 Vt. 645; *Ryan v. Dayton*, 25 Conn. 188. The damage to the employer is, in such case, to be deducted from the agreed price for the time. *Patrick v. Putnam*, 27 Vt. 750; *Hillyard v. Crabtree*, 11 Texas, 264; *Ryan v. Dayton*, 25 Conn. 188.]

(*u*) *Cook v. Jennings*, 7 T. R. 381; cited by *Bayley J. Grimman v. Legge*, 8 B. & C. 326; and see *Vlierboom v. Chapman*, 13 M. & W. 230.

(*x*) *Grimman v. Legge*, 8 B. & C. 324. But now he may. See 33 & 34 Vict. c. 35, s. 3.

(*y*) *Morrison v. Chadwick*, 7 C. B. 266, 283; [*ante*, 512, note (*b*); *Shumway v.*

Collins, 6 Gray, 227; *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 Allen, 219, note.] But this would be no defence to an action on the covenant to repair. See *Morrison v. Chadwick*, *supra*; *Newton v. Allin*, 1 Q. B. 518.

(*z*) *Ante*, 651; and see per Cur. *Chanter v. Leese*, 4 M. & W. 295, 311.

(*a*) *Stokes v. Cooper*, 3 Camp. 514, note.

(*b*) Per Parke B. *Reeve v. Bird*, 1 Cr. M. & R. 31, 36.

(*c*) Co. Litt. 148 b; and see *Neale v. M'Kenzie*, 1 M. & W. 747; *Upton v. Townend*, 17 C. B. 30. [See per Spencer, Senator, in *Dyett v. Pendleton*, 8 Cowen, 727; S. C. 4 Cowen, 581; *Bennett v. Bittle*, 4 Rawle, 339; *Shumway v. Collins*, 6 Gray, 227; *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 Allen, 219, note; *ante*, 512, and note (*b*). It seems now to

Ninthly. Whether one *promise* be the consideration for another, or whether the *performance*, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense to each particular case. (*d*)

For the purpose of ascertaining this intention, and determining when performance, or an excuse of performance by the plaintiff, should be averred in the declaration and proved at the trial, certain rules have been stated in various decisions and books of authority; and to these the reader is referred for information on this subject. (*e*)

be settled, in the United States, that a landlord by gross personal misconduct towards his tenant may be barred of his action for rent. *Ogilvie v. Hull*, 5 Hill, 52; *Dyett v. Pendleton*, 8 Cowen, 727; *Gilhooley v. Washington*, 4 Comst. 217; *Christopher v. Austin*, 1 Kernan, 216; *Cohen v. Dupont*, 1 Sandf. 260; *Jackson v. Eddy*, 12 Misson. 209.]

(*d*) Per Cur. *Stavers v. Curling*, 3 Scott, 750, 754; per *Williams J. Christie v. Borelly*, 7 C. B. N. S. 567; [*Brokenbrough v. Ward*, 4 Rand. 352; *Johnson v. Reed*, 9 Mass. 78; *Gardner v. Corson*, 15 Mass. 500; *Howland v. Leach*, 11 Pick. 154; *Bean v. Atwater*, 4 Conn. 3; *Knight v. New England Worsted Co.* 2 Cush. 285, 286; *Leonard v. Dyer*, 26 Conn. 176, 177; *Cadwell v. Blake*, 6 Gray, 402.]

(*e*) *Graves v. Legg*, 9 Exch. 709, 716; 1 Wms. Saund. 320 a; 2 Smith L. C. 10; *Dicker v. Jackson*, 6 C. B. 103; *Jowett v. Spencer*, 1 Exch. 647; *Judson v. Bowden*, Ib. 161; *Kingdom v. Cox*, 5 C. B. 522; *Hall v. Bainbridge*, 5 Q. B. 233; *Coombe v. Green*, 11 M. & W. 480; *Fishmongers' Co. v. Robertson*, 5 M. & G. 131; *Stavers v. Curling*, 3 Scott, 750, 754; 1 Chit. Pl. 6th ed. 323, 324. For cases on contracts of charter-party, see *Oliver v. Fielden*, 4 Exch. 135; *Ollive v. Booker*, 1 Exch. 416; *Glaholm v. Hays*, 2 M. & G. 257. [The same rules of construction, upon the point referred to in the text, apply to a simple contract, as to a contract under seal. *Kane v. Hood*, 13 Pick. 281, 282. Some of the stipulations in an entire contract

may be dependent and others independent, according to their nature and the order of performance. *Couch v. Ingersoll*, 2 Pick. 292; *Kane v. Hood*, 13 Pick. 281; *Knight v. New England Worsted Co.* 2 Cush. 286, 287. Where mutual covenants go to the whole consideration on both sides, they are dependent covenants, the one precedent to the other. But where they go only to a part, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. This rule was laid down by Lord Mansfield in *Boone v. Eyre*, 2 W. Bl. 1312, cited in 1 H. Bl. 273, in a note. It has been restated and affirmed, with slight variations adapting it to particular circumstances, in a great number of cases, both in England and in this country. *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Campbell v. Jones*, 6 T. R. 570; *Havelock v. Geddes*, 10 East, 555, 564; *Glazebrooke v. Woodrow*, 8 T. R. 366; *Stover v. Gordon*, 3 M. & S. 308; *Kingston v. Preston*, cited in *Jones v. Barkley*, 2 Doug. 684, 689; *Cutter v. Powell*, 2 Smith Lead. Ca. 10, note; 1 Chitty Pl. (9th Am. ed.) 323, 324. These principles were fully recognized and adopted in *Hopkins v. Young*, 11 Mass. 302; *Tileston v. Newell*, 13 Mass. 406; *Dox v. Dey*, 3 Wend. 356. If a party promise to build a house upon the land of another, and to dig a well on the premises, and to place a pump in it; and the owner of the land covenants seasonably to supply all materials, and furnish a pump; it is very clear

In the case of a *condition precedent* — that is, where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, — the plaintiff must aver in his declaration, and prove, either his performance of such condition precedent, or an offer to perform it, which the defendant rejected ; (*f*) or he may aver his readiness to fulfil the condition, (*g*) until the defendant discharged him from so doing, or prevented the execution of the matter which was to be performed by him. (*g*¹) For where the right to demand the performance of a certain act, depends on the execution by the promisee of a condition precedent, or prior act, it is clear that the readiness and offer of the latter to fulfil the

that the stipulation to furnish materials is dependent and constitutes a condition, because the builder cannot perform on his part, until he has the materials. So, to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance, on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by an action on the contract. *Knight v. New England Worsted Co.* 2 Cush. 286, 287, per Shaw C. J. See *Rives v. Baptiste*, 25 Ala. 382. Where one agrees to perform labor within a certain time upon articles to be furnished by another, the seasonable furnishing of the articles is a condition precedent to the performance of the labor. *Clement v. Clement*, 8 N. H. 210; *Mill Dam Foundry v. Hovey*, 21 Pick. 439; *Thomas v. Cadwallader*, Willes, 496; *Knight v. N. E. Worsted Co.* 2 Cush. 286; *Hill v. Hovey*, 26 Vt. 109. So, where A. agrees to supply certain machines according to a model to be furnished by B., the furnishing of the model is a condition precedent; but if B. fails to furnish the model, this gives A. no right to procure such a one as he may suppose B. should have furnished, and make the machines according to it. *Savage Manuf. Co. v. Armstrong*, 19 Maine, 147. See *Coombe v. Greene*, 11 M. & W. 480; *Macintosh v. The M. C. Railway Co.* 14 M. & W. 548. Where the party who is

to do the precedent act fails in the performance, the other party may abandon the contract and recover for what he has done; he is not bound to make a special demand for the performance of the precedent act. *Hill v. Hovey*, 26 Vt. 109.]

(*f*) *Graves v. Legg*, 9 Exch. 709, 716. [One who has refused to fulfil his part of a contract cannot claim damages of the other party for not fulfilling his part. *Dey v. Dox*, 9 Wend. 129. So, on the other hand, if a person promise to pay a sum of money *when* he should collect his demands of a third party, the promise may be enforced as absolute, if it appear that there are no such demands, or that due diligence has not been used in collecting them. *White v. Snell*, 5 Pick. 425. See S. C. 9 Pick. 16.]

(*g*) What is sufficient evidence of this, see *Cort v. Ambergate &c. Railway Co.* 17 Q. B. 127; 20 L. J. Q. B. 460.

(*g*¹) [*Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Shaw v. Turnpike Co.* 2 Penn. 454; *Dana v. King*, 2 Pick. 155; *Hunt v. Livermore*, 5 Pick. 395; *Willington v. Inhab. of West Boylston*, 4 Pick. 111; *Albany Dutch Church v. Bradford*, 8 Cowen, 457; *Cole v. Hester*, 9 Ired. 23; *Brown v. Cannon*, 5 Gilman, 174. Where, by the terms of a contract, goods are to be delivered at a particular place, the plaintiffs, before they can recover their pay for them, are bound to prove a delivery at the place agreed upon. *Savage Manuf. Co. v. Armstrong*, 19 Maine, 147.]

condition, and the discharge or hindrance of its performance by the promiser are in law equivalent to the completion of the condition precedent, and will render the promiser liable upon his contract. (*h*)

So if a man bind himself to do certain acts, which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act, which he has so rendered himself unable to perform. (*i*)

But it would seem that a condition precedent may be divisible; and where this is the case, performance as to one part will entitle the party to sue, for the non-performance of the corresponding part of the agreement. (*k*)

And where a party has accepted a part performance of the contract, he precludes himself from insisting on the performance of the remainder, as a condition precedent to the plaintiff's right to recover. (*l*)

In the case of *concurrent considerations*, that is, where the acts to be done by each party are to occur at the same period, neither party can sue on the contract, without showing that he was ready and willing to perform his part thereof, (*l*¹) or a discharge or pre-

(*h*) *Hotham v. East India Co.* 1 T. R. 638, note (*a*); *Smith v. Wilson*, 8 East, 443; *Alcorn v. Westbrook*, 1 Wils. 115; [*Lord v. Belknap*, 1 Cush. 279; *Smith v. Lewis*, 26 Conn. 110.]

(*i*) Per Cur. *Sands v. Clarke*, 8 C. B. 751, 762; [*Clark v. Crandall*, 3 Barb. 612; *Bannister v. Weatherford*, 7 B. Mon. 271; *Newcomb v. Brackett*, 16 Mass. 161; *Yclverton* (Am. ed.) 76, in notes; *Buttrick v. Holden*, 8 Cush. 233, 235, 236; *Harris v. Williams*, 3 Jones Law (N. C.), 483.]

(*k*) Per Cur. *Ncale v. Ratcliff*, 15 Q. B. 916, 927; [*Leonard v. Dyer*, 26 Conn. 172, 178; *Grant v. Johnson*, 1 Selden (N. Y.), 247. See *Dey v. Dox*, 3 Wcnd. 356; 1 Chitty Pl. (9th Am. ed.) 323, 324; *Chanter v. Leese*, 4 M. & W. 311. Thus, where a person agreed to transport a certain quantity of lumber to a specified place at a stipulated rate per thousand feet, and it was not in terms expressly agreed that the whole quantity should be so transported, although such was the understanding

and expectation of the parties, and he afterwards did so transport a part thereof, but through the operation of causes which he could not by reasonable care control, was prevented from transporting the residue, it was held, that the transportation of the whole quantity was not a condition precedent to a right of recovery, and that a recovery might be had for the services actually rendered. *Leonard v. Dyer*, 26 Conn. 172.]

(*l*) *White v. Beeton*, 7 H. & N. 42.

(*l*¹) [*Smith v. Lewis*, 26 Conn. 110; *Dana v. King*, 2 Pick. 155; *Howland v. Leach*, 11 Pick. 151; *Howe v. Huntington*, 15 Maine, 350; *Swan v. Drury*, 22 Pick. 485; *Warren v. Wheeler*, 21 Maine, 484; *Cornwall v. Haight*, 8 Barb. 327; *Jones v. Marsh*, 22 Vt. 144; *Shaw v. Turnpike Co.* 2 Penn. 454; *Lord v. Belknap*, 1 Cush. 279; *Grandy v. McCleese*, 2 Jones (Law), N. Car. 142; *Campbell v. Gittings*, 19 Ohio, 347; *Williams v. Healey*, 3 Denio, 363; *Gazley v. Price*, 16 John. 267; *Barbee v. Willard*, 4 McLean, 356;

vention of such performance by the other party. (m) And where there has been such discharge, the plaintiff must show notice to

Hough v. Rawson, 17 Ill. 588. In *Smith v. Lewis*, 26 Conn. 110, which was a suit for the breach of a contract containing mutual and dependent promises of the plaintiff and defendant, the declaration, after setting out the acts to be concurrently done by the parties on a day named, alleged that the plaintiff was on that day ready and willing to perform all the acts to be by him performed, specifying them, but that although he had performed everything on his part to be performed, the defendant had wholly refused to perform; and it was held, that regarding only the averment of readiness and willingness to perform, the declaration was not insufficient in not alleging an offer to perform, since the refusal of the defendant to perform superseded the necessity of anything more on the part of the plaintiff than readiness and willingness to perform, and the averment of such refusal rendered the averment of such offer unnecessary. Storrs C. J. said: "As the agreement required only that the acts of both the parties should be done at the same time, neither was obliged to do the first act, or consequently to perform his part of the agreement without or before the other. The plaintiff, in order to sustain this action, need only to show that he did what the law required of him; and all that it required was, that he should be ready and willing to perform on his part, if the defendant was also ready to perform on his." "Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, but the transaction is complete and ended;

but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."]

(m) *Giles v. Giles*, 9 Q. B. 164; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Rawson v. Johnson*, 1 East, 203; and see *Spiller v. Westlake*, 2 B. & Ad. 155; [See *v. Partidge*, 2 Duer (N. Y.), 463; *Smith v. Lipscomb*, 13 Texas, 532; *Shaw v. Turnpike Co.* 3 Penn. 445. A refusal of one of the parties to a contract founded on mutual and concurrent conditions, to perform his covenants, will excuse a want of entire and absolute preparation by the other. *Smith v. Lewis*, 24 Conn. 624. See S. C. 26 Conn. 110. The party to such contract, seeking to recover for a breach, must, at least, show that he was "ready and willing" to perform his part of the agreement. *Ib.* The voluntary absence of such a party from a place assigned for its performance, is tantamount to a refusal, and will excuse the other party from the performance of such acts as the absence renders impossible or nugatory, and tends directly to dissuade. Such a refusal will excuse acts of mere formal preparation, as well as acts of strict performance, if the refusal is the direct and reasonable cause of their omission. *Smith v. Lewis*, 24 Conn. 624.]

the other side, of his readiness and willingness to perform the contract. (*n*)

But in the case of *independent* mutual contracts or promises, each party has his remedy on the promise made in his favor, without performing his part of the contract. (*o*)

Even in such a case, however, if the mutual contracts are in the same instrument, and the defendant, if he were to sue the plaintiff on his contract, would be entitled to recover in that action the identical sum for which the plaintiff is suing, he may, in order to avoid circuity of action, plead the non-performance of the plaintiff's contract, as a bar to the action by him. (*p*)

Tenthly. If, by the terms of the contract, the promiser is to become bound only on the performance of a condition precedent, he will not become bound if it be not performed, although performance thereof was prevented by the act of God. (*q*) Nor will he become bound where such performance was prevented by the act of a mere *stranger*, not procured at the instance of the promiser himself. (*r*)

(*n*) *Doogood v. Rose*, 9 C. B. 132. [See *Smith v. Lewis*, 26 Conn. 110; S. C. 24 Conn. 624.]

(*o*) 1 Wms. Saund. 320, note (4); *Franklin v. Miller*, 4 A. & E. 599; 2 *Smith L. C.* 10; *Lucas v. Godwin*, 4 Scott, 502; *French v. Trewin*, 1 Ld. Raym. 412; [Thomas v. Cadwallader, Willes, 499; *Sumner v. Parker*, 36 N. H. 449; *Allard v. Belfast*, 40 Maine, 369; *Knight v. New England Worsted Co.* 2 Cush. 271; *Putnam v. Mellen*, 34 N. H. 71. Where time is given for performance on one side, and payments are to be made on the other within such time, it is certain that the making of payments cannot depend upon a complete and full performance. Per *Shaw C. J.* in *Lord v. Belknap*, 1 Cush. 284; *Kane v. Hood*, 13 Pick. 281. But where by a contract under seal, the plaintiff agreed to convey land to the defendant on condition that he should pay the purchase-money as therein specified, and the defendant covenanted to pay the same in five equal instalments; and the defendant having omitted to pay any of the instalments, the plaintiff, after they were all due, brought an action on the contract for the whole of the purchase-money; it was

held, that he was not entitled to recover any part of it without proving an offer before suit brought to convey the land to the defendant on receiving the purchase-money. When the last instalment became due, the payment of the whole of the unpaid purchase-money and the conveyance of the land, became dependent acts. *Beecher v. Conradt*, 3 Kernan (N. Y.), 108. See *Howe v. Bradley*, 19 Maine, 31; *Kane v. Hood*, 13 Pick. 281; *Fairbanks v. Dow*, 6 N. H. 266. Agreements may be independent as to the acts to be performed by one party and dependent as to the acts to be performed by the other. Per *Nelson J.* in *Dey v. Dox*, 9 Wend. 133. But see *Putnam v. Mellen*, 34 N. H. 71, 79; *Sumner v. Parker*, 36 N. H. 449.]

(*p*) 2 Wms. Saund. 149, 150; *Connop v. Levy*, 11 Q. B. 769 *Charles v. Altin*, 15 C. B. 46; *Thompson v. Gillespy*, 5 E. & B. 209, 223; *Alston v. Herring*, 11 Exch. 822; *Minshull v. Oakes*, 2 H. & N. 793, 809.

(*q*) See *Crookewit v. Fletcher*, 1 H. & N. 893.

(*r*) *Thurnell v. Balbirnie*, 2 M. & W. 786, 790; *Brogden v. Marriott*, 2 Scott, 703, 710.

Thus where, by the proposals of the Phoenix Company, it was stipulated that persons insured should give notice of any loss forthwith; and should deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they knew the character of the assured, and believed that he had really and *bonâ fide* sustained the loss; it was decided that, although the minister, without any reason refused to sign the certificate, the assured could not recover without it. (s) So, if a man covenant that his son shall marry the covenantee's daughter, a refusal by her will not discharge the covenantor from making pecuniary satisfaction. (t) And if A. covenant with C. to enfeoff B., A. is not released from his covenant by B.'s refusal to accept livery of seisin. (u)

Eleventhly. In all cases the promiser will be discharged from liability, if he be prevented by the act or default of the promisee, from completing the contract within the time limited; (x) that is, where the promisee actually prevents the performance of the contract; where he is the *causa causans*, and not merely the *causa sine quâ non*. (y) Thus, if A. agree to pay money to B. on a certain day, the latter being then abroad, A. is bound to pay the money on that day. But if B. were in England at the time of the contract, and went abroad before the day, an averment that A.

(s) *Worsley v. Wood*, 6 T. R. 710. Covenant in a charter-party to pay the value of reshipping in case of capture, *provided it should appear to a court-martial* that the captain had made the best defence. The holding a court-martial is indispensable as a condition precedent. *Davison v. Moore*, 3 Dougl. 28. In the case of an agreement, to pay for work *on an architect certifying* that it has been done, such certificate is essential. *Milner v. Field*, 5 Exch. 829; *Morgan v. Birnie*, 9 Bing. 672.

(t) *Perkins*, sect. 756.

(u) *Cook v. Jennings*, 7 T. R. 384. See *M'Neil v. Reid*, 9 Bing. 68.

(x) *Per Parke B. Holme v. Guppy*, 3 M. & W. 387, 389; *Armitage v. Insole*, 14 Q. B. 728; *Ellen v. Topp*, 6 Exch. 424; *Com. Dig. Condition*, L. 6; *Shep. Touch.* 174. And see *Roberts v. Bury Commissioners*, L. Rep. 4 C. P. 755; (in *Cam. Scac.*) 5 Ib. 310; *Jones v. St. John's*

College, L. Rep. 6 Q. B. 115; [*Grove v. Donaldson*, 15 Penn. St. 128; *Kugler v. Wiseman*, 20 Ohio, 361. If the covenantee hinder the performance of a covenant, the covenantor is excused for non-performance. *Show v. Hurd*, 3 Bibb, 372; *Marshall v. Craig*, 1 Bibb, 379; *Borden v. Borden*, 5 Mass. 67. See *Kleine v. Catara*, 2 Gallis. 74. Where there is a covenant to perform a thing on a certain day, if performance of another thing, or performance at another time, be accepted in lieu thereof, it is an answer in an action for the non-performance of the thing stipulated. *Porter v. Stewart*, 2 Aiken, 427; *Warren v. Maine*, 7 John. 476. See *Lindsey v. Gordon*, 13 Maine, 60; *Clendennen v. Paulsel*, 3 Missou. 230. See, also, *Crump v. Mead*, 3 Missou. 233; *Enniss v. O'Conner*, 3 Harr. & J. 163.]

(y) *Per Cur. Alston v. Herring*, 11 Exch. 822, 830.

was, on the day, ready and willing to pay the money, would be sufficient. (z) So, if the non-performance of the contract be occasioned by a subsequent agreement between the parties, which prevented, and which the party who complains of the breach knew would prevent, the performance of the original contract, this will excuse such breach. (a) So, if the time or mode of performance is to depend upon the notice or appointment of the covenantee; (b) or if his personal attendance be essential, and yet he absent himself; (c) or if the undertaking be, that I shall marry a certain woman by a named day, and before that time the promisee himself marry her; (d) in all these cases the promiser is not liable. So, where the promisee is bound by law to do a certain act, which will render the performance of the contract lawful, — *e. g.* to procure a license for his theatre, at which the defendant had promised to dance, — no action can be maintained for the breach of the engagement, until such act has been done. (e) So if, after the making of the contract, the promisee does an act, the effect of which would be to subject the promiser to an action at the suit of a third party, were he duly to perform his contract; this will excuse his non-performance thereof. (f) Thus, where the plaintiffs delivered a chattel to the defendants, on the agreement of the latter to redeliver it to them at a certain time; and, before that time, the plaintiffs mortgaged the chattel to A., who thereupon demanded possession thereof from the defendants, under his mortgage; this was held to justify the non-delivery of the chattel by the defendants according to their contract. (g) So, where a contract was made by a coachmaker, to furnish a carriage and keep it in repair for a certain term; and the coachmaker sold his business and his interest in the contract to another person; it was held, that the party who hired the carriage might treat the agreement as at an end, on the ground that, the contract being a personal one, the coachmaker had become incapable of performing his part of it. (h) And we have seen, that a

(z) *Fessard v. Mugnier*, 18 C. B. N. S. 286.

(a) *Thornhill v. Neats*, 8 C. B. N. S. 831.

(b) *Studholme v. Mandell*, 1 Ld. Raym. 279; S. C. Lutw. 213; *Gallini v. Laborie*, 5 T. R. 242.

(c) *Bryant v. Beattie*, 5 Scott, 751, 765; Roll. Abr. Condition, n. pl. 2.

(d) *Co. Litt.* 206; *Bridges v. Bedingfield*, 2 Mod. 28.

(e) *Gallini v. Laborie*, 5 T. R. 242; *De Begnis v. Armistead*, 10 Bing. 107.

(f) *European &c. Mail Company v. Royal Mail Steam Packet Company*, 30 L. J. C. P. 247.

(g) *European &c. Mail Company v. Royal Mail Steam Packet Company*, 30 L. J. C. P. 247.

(h) *Robson v. Drummond*, 2 B. & Ad. 303. [See, as to the assignable nature of contracts, *Clinton v. Fly*, 1 Fairf. 292;

publisher will discharge an author from liability to provide articles agreed to be inserted in a particular publication, by altering the nature of the work in which such articles were to appear; or requiring that they should be published separately, contrary to the spirit of the contract, and to the probable injury of the author's reputation. (*i*)

So if a party who is entitled under a contract, to receive a profit from another, by his own act so confounds the measure of that which he was to receive, that it can no longer be ascertained, he vacates his whole claim. Thus, where A. agreed to find sufficient coal for B.'s engine, to draw water from A.'s mine and B.'s little coal-mine, *as they then stood*; and B. sunk to a lower seam, in draining which he drained the other two seams, but consumed for his engine more coals than before; it was held, that A. was no longer bound to furnish any coal, because B. had destroyed the measure of sufficiency. (*k*)

But whether one party wrongfully withdrew from the completion of his contract, or whether he was discharged therefrom by the conduct of the other, may be a question for the jury. (*l*)

6. In general, a contract cannot be rescinded, unless by consent of both parties. (*l*¹)

But a contract may be rescinded on account of fraud; (*m*) or because there is a complete difference in

When the contract may be rescinded.

Mayhew *v.* Scott, 10 Pick. 55, 56; Davis *v.* Coburn, 8 Mass. 299; Hall *v.* Gardner, 1 Mass. 172; Estes *v.* Hariston, 1 Dev. 354; Index "Assignment."

(*i*) Planché *v.* Colburn, 8 Bing. 14; 5 C. & P. 58.

(*k*) Pringle *v.* Taylor, 2 Taunt. 150.

(*l*) Pontifex *v.* Wilkinson, 1 C. B. 75.

What will amount to proof of his having been so discharged, Cort *v.* Ambergate &c. Railway Company, 17 Q. B. 127; 20 L. J. Q. B. 460, 465. [When parties expressly stipulate in their contract, that a non-performance of it shall be excused upon precisely such terms as the law, in the absence of such a stipulation would supply, the stipulation, although express, is not a condition which qualifies the contract, or in any way affects its import, and the plaintiff need not count upon it in his declaration,

or prove it upon the trial. Waters *v.* Bristol, 26 Conn. 398.]

(*l*¹) [See Wheeden *v.* Fiske, 50 N. H. 125, 129.]

(*m*) Fitt *v.* Cassanet, 4 M. & G. 898, 903; per Coleridge J. Franklin *v.* Miller, 4 A. & E. 599, 606; and see Lewis *v.* Clifton, 14 C. B. 245; [Farris *v.* Ware, 60 Maine, 482; ante, 1043, note (*j*¹).] A party having an election to rescind an entire contract, must rescind it wholly, or in no part. Miner *v.* Bradley, 22 Pick. 457; Voorhees *v.* Earl, 2 Hill (N. Y.), 292, 293. He cannot consider it void to reclaim his property, and at the same time in force for the purpose of recovering damages. Jenkins *v.* Simpson, 14 Maine, 364. The contract cannot be rescinded as to one party, and remain in force as to the other. Coolidge *v.* Brigham, 1 Met. 550. A party

substance, between the thing bargained for, and that obtained under the contract. (*n*)

So the non-performance of a condition precedent, before any default by the defendant, (*o*) entitles the latter to consider himself freed from his liability to do the act, which he agreed to perform after such condition precedent should have been executed. (*p*)

So, where a party who was to perform a condition precedent by a certain time, disables himself before that time from performing

cannot rescind a contract and at the same time retain the consideration in whole or in part, which he has received under it. *Jennings v. Gage*, 13 Ill. 610; *Coolidge v. Brigham*, 1 Met. 550; *Miner v. Bradley*, 22 Pick. 457; *Perley v. Balch*, 23 Pick. 286; *Norton v. Young*, 3 Greenl. 30; *Cushman v. Marshall*, 21 Maine, 122; *Sumner v. Parker*, 36 N. H. 449. Where the vendor would rescind a contract of sale on account of the fraud of the vendee, it is his duty to restore what he has received in payment, before he can sustain an action to recover the goods sold. *Norton v. Young*, 3 Greenl. 30; *Cushing v. Wyman*, 38 Maine, 589; *Cook v. Gilman*, 34 N. H. 556; *Evans v. Gale*, 21 N. H. 240; *post*, 1092, note (*a*). If one party in an executory contract, do an act which will authorize the other party to consider it as rescinded, and he accordingly bring an action on an implied promise to recover a compensation for part performance, as though no special contract existed, he cannot at the same time claim under the contract, so as to entitle him to damages which he could not recover except by virtue of the contract. *Hill v. Green*, 4 Pick. 114. A. agreed to deliver to B. some step-stones, which were to be paid for one half in money and one half in goods. The stones were delivered, and B. delivered some of the goods on the special contract. B. having sued A. and recovered judgment for the value of the goods delivered, declaring upon the common counts only, it was held that A. might, upon the common counts only, recover the value of the stones. *Goodrich v. Laffin*, 1 Pick. 57. See *Quincy v. Tilton*, 5 Greenl. 277.] Instance of

an agreement to rescind; *James v. Cotton*, 7 Bing. 266. Bankruptcy does not in general rescind a contract; *Boorman v. Nash*, 9 B. & C. 145. As to the effect of a disclaimer by the trustee, under "The Bankruptcy Act, 1869," s. 23, see *ante*, 370.

(*n*) *Kennedy v. Panama &c. Mail Company* (in Cam. Scac.), L. R. 2 Q. B. 580, 587; and see *Gompertz v. Bartlett*, 3 E. & B. 849; *Gurney v. Wormersley*, 4 Ib. 133.

(*o*) *Fitt v. Cassanet*, 4 M. & G. 898.

(*p*) See *Jones v. Gibbons*, 8 Exch. 920; *Johnassohn v. Great Northern Railway Company*, 10 Exch. 434; *Mawman v. Gillett*, 2 Taunt. 325, note; [*Dodge v. Greely*, 31 Maine, 343; *Dwinell v. Howard*, 30 Maine, 258; *Clement v. Clement*, 8 N. H. 210; *Savage Manuf. Company v. Armstrong*, 19 Maine, 147; *Chapin v. Norton*, 6 McLean, 500; *Webb v. Stone*, 24 N. H. 282; *Luey v. Bundy*, 9 N. H. 298; *Kimball v. Grover*, 11 N. H. 375; *Snow v. Prescott*, 12 N. H. 535. Where one of the parties has departed from a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded. *Goodrich v. Laffin*, 1 Pick. 57. See *Hill v. Green*, 4 Pick. (2d ed.) 116, n. (2); *Shaw v. Turnpike Company*, 3 Penn. 445; *Dubois v. Del. & Hudson Canal Co.* 4 Wend. 285. So, where by the terms of the contract, concurrent acts are to be performed, as a delivery of property by one party, and a payment of the price by the other, if either party should refuse to perform his part of the contract, the other party may treat it as an abandonment of the contract, and justify a rescission of it. *Fletcher v. Cole*, 23 Vt. 114.]

it, the other party may abandon the contract. (*q*) And so where, by the terms of the contract, a service to be performed by A. for B. is to be paid for in goods; if B. by his own act render the delivery of the goods impossible, A. may sue in debt for the value of his service, and is not bound to sue on the special contract. (*r*)

So, where the agreement was, that the defendants should buy of the plaintiffs 667 tons of iron, to be shipped from Sweden ^{Continuing contract.} in the months of June, July, August, and September, *in about equal portions each month*; and the plaintiffs shipped only twenty-one tons in June; it was held, in an action by them against the defendants for refusing to accept the iron, that the defendants were entitled to refuse the twenty-one tons so shipped, and also to give notice to the plaintiffs that they would not accept the residue of the iron. (*s*)

So, where R. agreed to supply W. with straw, to be delivered at W.'s premises at the rate of three loads in a fortnight, during a specified time; and W. agreed to pay R. for each load of straw delivered on the premises during that time; but, after some of the straw had been delivered, W. refused to pay for the last load, and insisted on always keeping one payment in arrear; it was held that, W. having refused to pay for each load on delivery, R. was not bound to supply any more. (*t*)

There are, moreover, some cases in which, although an agreement of a continuing nature has been in part performed, the further performance of it may be excused or discharged, by conduct of the other party wholly at variance with the spirit of the contract. (*u*)

But it is a clearly recognized principle, that if there be only a

(*q*) *Chanter v. Leese*, 4 M. & W. 295, 311; [*Frost v. Jackson*, 7 Cowen, 24.]

(*r*) *Keys v. Harwood*, 2 C. B. 905.

(*s*) *Hoare v. Rennie*, 5 H. & N. 19; and see *Coddington v. Paleologo*, L. Rep. 2 Exch. 193.

(*t*) *Withers v. Reynolds*, 2 B. & Ad. 882. [See *Lord v. Belknap*, 1 Cush. 279. Where, under a contract for the sale of goods, deliverable on future days, at a fixed price, payable at specified times, the purchaser fails to pay a part of the price at the time appointed for its payment, the vendor may rescind the contract, and is not liable to pay back any part of the money already received, even though it

exceed what the goods already delivered, at the agreed price, would amount to.

Dwinel v. Howard, 30 Maine, 258; *Preble v. Bottom*, 27 Vt. 249.]

(*u*) See *Planché v. Colburn*, 8 Bing. 14; *Burton v. Pinkerton*, L. Rep. 2 Exch. 340; [*Reybold v. Voorhees*, 30 Penn. St. 116.

If the act of one party be such as necessarily to prevent the other party from completing his part of the contract according to the terms of it, the contract may be treated as rescinded by such other party, and he may resort to his *quantum meruit*. *Dubois v. Delaware & Hudson Canal Co.* 4 Wend. 285; *Hall v. Rupley*, 10 Barr. 231; *Moulton v. Trask*, 9 Met. 577; *Der-*

partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to. (*x*)

Contract can be rescinded, only by party who has made no default; and within a reasonable time;

And the right to abandon a contract vests only in the party who has been guilty of no default; for a man cannot take advantage of his own wrong, in order to put an end to a contract into which he has entered. (*y*)

So, such right, when it does exist, must be exercised within a reasonable time. (*z*)

and where both can be placed in *statu quo*.

Nor can a contract, in general, be rescinded *in toto* by one of the parties, where both of them cannot be placed in the identical situation which they occupied when the contract was made. (*a*) And accordingly, where one party

by *c.* Johnson, 21 Vt. 17; Hoagland *v.* Moore, 2 Blackf. 167; Goodman *v.* Pocock, 15 Q. B. 576; Webster *v.* Enfield, 5 Gilman, 298; and in Webb *v.* Stone, 24 N. H. 288, Bell J. said: "We take the law to be settled here, that whenever one party to a contract refuses to execute any substantial part of his agreement, he thereby gives to the other party the option to rescind the entire contract." *Ante*, 830, note (*l*).]

(*x*) Per Littledale J. Franklin *v.* Miller, 4 A. & E. 599, 605; and see Johnasohn *v.* Young, 4 B. & S. 296; Weaver *v.* Sessions, 6 Taunt. 155. [See Keenan *v.* Brown, 21 Vt. 86.]

(*y*) See Hughes *v.* Palmer, 19 C. B. N. S. 393; Malins *v.* Freeman, 6 Scott, 187, 193; Doe *d.* Bryan *v.* Bancks, 4 B. & Ald. 401; [Smith *v.* Gugerty, 4 Barb. 614. So a person cannot, by an action in his own name, or jointly with another, maintain a suit and rescind his own contract, on the ground that his contract was a fraud on such other person. Greeley *v.* Wyeth, 10 N. H. 15; Homer *v.* Wood, 11 Cush. 62.]

(*z*) Towers *v.* Barrett, 1 T. R. 136; Hinde *v.* Whitehouse, 7 East, 571; Hodgson *v.* Davies, 2 Camp. 530; Okell *v.* Smith, 1 Stark. 107; Hopkins *v.* Appleby, *Ib.* 477; Prosser *v.* Hooper, 1 Moore, 106; Mawman *v.* Gillett, 2 Taunt. 325, note; and see Pooley *v.* Brown, 11 C. B. N. S. 566; [Getchell *v.* Chase, 37 N. H. 110; Webb *v.* Stone, 24 N. H. 282; Norton *v.* Young,

3 Greenl. 30; Veazie *v.* Williams, 3 Story, 612. A party, having once been entitled to rescind a contract, because it has not been performed in a reasonable time, if he do any act which amounts to an admission of the existence of the contract, cannot afterwards elect to treat it as void. Brinley *v.* Tibbets, 7 Greenl. 70. See Lindsey *v.* Gordon, 13 Maine, 60; Barry *v.* Palmer, 19 Maine, 303; Lawrence *v.* Dale, 3 John. Ch. 23; Masson *v.* Bovet, 1 Denio, 69; Selway *v.* Fogg, 5 M. & W. 83. It is not competent for one party to a contract to enforce a performance upon refusal by the other to perform his part of it, and then use the refusal as a ground for rescinding the contract. Allen *v.* Webb, 24 N. H. 278; Luey *v.* Bundy, 9 N. H. 298; Selway *v.* Fogg, 5 M. & W. 82. The question, whether the sale is rescinded within a reasonable time, is a question of law, where the facts are not in dispute. Holbrook *v.* Burt, 22 Pick. 546; Kingsley *v.* Wallis, 14 Maine, 57. In the absence of all testimony, tending to show that so long a period was necessary, it was held, that a delay of two months and a half was beyond a reasonable time. Kingsley *v.* Wallis, 14 Maine, 57. See Lawrence *v.* Dale, 3 John. Ch. 23; Shaw *v.* Turnpike Co. 3 Penn. 445; Tripp *v.* Tripp, Rice, 84. If a party rescinds on the ground of fraud, he must do so promptly, on discovering the fraud. Masson *v.* Bovet, 1 Denio, 69; Selway *v.* Fogg, 5 M. & W. 83; Saratoga R. R. *v.* Row, 24 Wend. 74.]

(*a*) Blackburn *v.* Smith, 2 Exch. 783,

has derived some advantage, from the other party having, to some extent, performed the contract; the general rule is, that the agreement shall stand; and that the defendant must perform his part thereof, and seek compensation, in damages, for the plaintiff's default. (*a*¹)

Although, however, this is the general rule, still there are cases of *partial failure* of consideration, in which the courts, in order to prevent unnecessary litigation, permit the defendant, instead of bringing a cross action, to set up such partial failure of consideration in reduction of dam-

Where evidence of partial failure may be given in reduction of damages.

792; per Tindal C. J. *Fitt v. Cassanet*, 4 M. & G. 898, 903; *Hunt v. Silk*, 5 East, 449; *Beed v. Blandford*, 2 Y. & J. 278; [*Lyon v. Bertram*, 20 How. (U. S.) 149, 154, 155; *Bartlett v. Drake*, 100 Mass. 176; *Burton v. Stewart*, 3 Wend. 236; *Hammond v. Buckmaster*, 22 Vt. 375; *Fay v. Oliver*, 20 Vt. 118; *Coolidge v. Brigham*, 1 Met. 547; *Thayer v. Turner*, 8 Met. 550; *Stevens v. Austin*, 1 Met. 557; *Howard v. Cadwalader*, 5 Blackf. 225; *Newell v. Turner*, 9 Porter, 420; *Bacon v. Brown*, 4 Bibb, 91; *Martin v. Roberts*, 5 Cush. 126; *Pittsburg &c. Turnpike Co. v. Commonwealth*, 2 Watts, 433; *Brown v. Witter*, 1 Wilcox, 142; *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 Mass. 319; *Reed v. M'Grew*, 5 Ham. 386; *Johnson v. Titus*, 2 Hill, 606; *Potter v. Titcomb*, 23 Maine, 300; 2 Kent (5th ed.), 480; *Peters v. Gooch*, 4 Blackf. 516; *Allen v. Edgarton*, 3 Vt. 442; *Shepherd v. Temple*, 3 N. H. 455; *Wiggin v. Foss*, 4 N. H. 294; *Luey v. Bundy*, 9 N. H. 298; *Cook v. Gilman*, 34 N. H. 556, 561; *Webb v. Stone*, 24 N. H. 282. The purchaser of a chattel cannot rescind the sale without returning it to the vendor, unless it be entirely worthless to both parties; if it be of any value to the vendor, or if its loss would be any injury to him, it must be returned. *Perley v. Balch*, 23 Pick. 283. See *Sandford v. Dodd*, 2 Day, 437; *Tisdale v. Buckmore*, 33 Maine, 461; *Dorr v. Fisher*, 1 Cush. 271, 274; *Getchell v. Chase*, 37 N. H. 110; *Moyer v. Shoemaker*, 5 Barb. 319. This general rule applies as well to a rescission on the ground

of misrepresentation and fraud as to other cases. *Kimball v. Cunningham*, 4 Mass. 502; *Thurston v. Blanchard*, 22 Pick. 18; *Thayer v. Turner*, 8 Met. 550; *Masson v. Bovet*, 1 Denio, 74; *Bartlett v. Drake*, 100 Mass. 176. There are exceptions to the general rule which grow out of and are founded upon the deficient capacity of the party who seeks to be relieved from the contract. *Bartlett v. Drake*, 100 Mass. 176; *Gibson v. Soper*, 6 Gray, 279; *Chandler v. Simmons*, 97 Mass. 508, 514; *Price v. Furman*, 27 Vt. 268; *Bartlett v. Cowles*, 15 Gray, 445; *Boody v. McKenney*, 23 Maine, 517. As to the formalities necessary to revest the title to property where the parties rescind a sale by agreement, see *Quincy v. Tilton*, 5 Greenl. 277; *Gleason v. Drew*, 9 Greenl. 81, 82; *Miller v. Smith*, 1 Mason, 437; *Tripp v. Tripp*, Rice, 84; *Beecher v. Mayall*, 16 Gray, 376.]

(*a*¹) [See *Hill v. Rewee*, 11 Met. 271, 272; *Leonard v. Morgan*, 6 Gray, 412. But in a case where the vendor of an article received in payment therefor a promissory note of a third person, falsely and fraudulently represented by the vendee to be solvent, together with an order on a third person for goods, which was duly paid, and the vendor returned the note to the vendee on discovery of the fraud; it was held, that the vendor might maintain an action of assumpsit to recover the price of the article sold, deducting therefrom the amount of the order, without returning the latter. *Martin v. Roberts*, 5 Cush. 126.]

ages. (*a*²) And this principle applies, generally, to cases of contracts for goods, or for work, labor, and materials; in which the defendant, when sued for the price, may show the insufficiency of the goods, or the incomplete performance of the work, even although it was agreed to be done for a specific price. (*b*)

But the defendant in such cases can only show how much less the subject-matter of the action was worth, by reason of the plaintiff's breach of contract, (*b*¹) and if he have any claim for damages beyond that, he must bring a cross action to recover them. (*c*)

And there are some cases in which the rule does not apply at all. Thus, it does not apply to actions on bills of exchange, in any case where a question of unliquidated damages would be raised, by inquiring into the consideration for such bill. (*b*) Nor, as it seems, can a contract for freight be rescinded, if the consignee has received the goods, and has therefore derived some benefit from the carriage, although they were damaged by the negligence of the carrier, to an extent exceeding the amount of the freight. (*c*) And we have seen, that if a vendee receive one of several articles, which were bought under an entire contract, and keep it after the time for completing the contract, he must pay for such article, although he might in the first instance have refused to take it; for such retention of part of the goods sold, disaffirms the entirety of the contract (*d*)

[Where money has been advanced on an executory contract for the delivery of goods, and the vendor has delivered, and the vendee

(*a*²) [*Ante*, 652, note (*d*¹), 653, note (*h*): Dewey J. in *Martin v. Roberts*, 5 Cush. 120, 128, 129; *Mixer v. Coburn*, 11 Met. 561; *Harrington v. Stratton*, 22 Pick. 510; *Parish v. Stone*, 14 Pick. 198; *McAllister v. Reab*, 4 Wend. 483; *Spalding v. Vandercook*, 2 Wend. 431; *Barton v. Stewart*, 3 Wend. 236; *Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 275; *Shepherd v. Temple*, 3 N. H. 455; *Hill v. Green*, 4 Pick. 114; *Jenkins v. Simpson*, 14 Maine, 364. See *Pulsifer v. Hotchkins*, 12 Conn. 234.]

(*b*) See very fully per Parke B. delivering the judgment of the court in *Mondel v. Steel*, 8 M. & W. 858, 870; 2 Smith L. C. 15; *Havelock v. Geddes*, 10 East, 564; *Wilbeam v. Ashton*, 1 Camp. 78; *Bragg v. Cole*, 6 Moore, 114; *Pordage v. Cole*, 1 Wms. Saund. 320 b, note.

(*b*¹) [*Ante*, 652, 653, and notes; *Goodwin v. Morse*, 9 Met. 278.]

(*c*) *Mondel v. Steel*, 8 M. & W. 858, 872. [See *Burnett v. Smith*, 4 Gray, 50.]

(*b*) *Warwick v. Nairn*, 10 Exch. 762; *Muggeridge v. Jones*, 14 East, 486; *Spiller v. Westlake*, 2 B. & Ad. 155; [*ante*, 652-654, and notes.]

(*c*) *Shields v. Davis*, 6 Taunt. 65. [See *Abbott Shipp*. (7th Am. ed.) 428, in note. Where goods arrived at the port of destination in so damaged a state as to be of no value, the owner of them was held not to be at liberty to abandon them for freight; but the ship-owner was entitled to full freight. *Griswold v. New York Ins. Co.* 3 John. 321; *Abbott Shipp*. (7th Am. ed.) 433, and notes.]

(*d*) *Ante*, 617.

has received, a part only of the stipulated quantity, and the vendor refuses to deliver the residue, if such residue is a precise and definite part, capable of being ascertained by computation, the vendee may disaffirm the contract, and recover back a corresponding part of the purchase-money, although the bargain or contract is in form entire.] (*d*¹)

2. Payment.

- | | |
|------------------------|--------------------------------------|
| 1. By whom made. | 5. How made. |
| 2. To whom made. | 6. Of the appropriation of payments. |
| 3. Of the amount paid. | 7. Of a receipt for the money. |
| 4. When presumed. | |

1. The general rule as to payment or satisfaction, not by the debtor himself, but by a third person who is not liable as a co-contractor or otherwise, appears to be, that it is not sufficient

(*d*¹) [*Hill v. Rewee*, 11 Met. 268, 272. In this case the defendant gave to the plaintiff a receipt for "one hundred and fifty dollars in full per contract for fifteen tons of hay, to be delivered to order;" and it was held that, in the absence of other evidence, this was an acknowledgment by the defendant, that he had one hundred and fifty dollars of the plaintiff's money, upon an executory contract for the delivery to him of a given quantity of hay, at a fixed price per ton, and that upon the defendant's delivery of thirteen tons only of the hay, and his refusal to deliver the residue, the plaintiff might recover of him, in an action for money had and received, the price of the other two tons, namely, twenty dollars. Shaw C. J. said: "The contract being for the delivery of a quantity of hay at a fixed price, and all of one quality, the price per ton fixed the price per pound. If, then, a part of the hay was delivered, according to the contract, but a precise and definite part remained undelivered, and the defendant, without justification or excuse, refused to deliver the other part on demand, the court were of opinion that a corresponding portion of the money advanced, capable of being ascertained by computation, might be recovered back. See *Johnson v. Johnson*, 3 Bos. & P. 162; *Parish v. Stone*, 14 Pick. 198; *Miner v. Bradley*, 22 Pick. 457. In this last case the defendant sold at auction a cow

and a quantity of hay, and the plaintiff bid them both off for seventeen dollars, and paid the money down at the time. The cow was delivered to him, and afterwards he demanded the hay, and it was refused by the defendant. The plaintiff sued to recover back the value of the hay, without rescinding the whole contract by returning the cow. The court held that he could not maintain his action. Morton J. said: "Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part; and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule; because in effect there is a separate contract for each separate article. This subject is well explained, and the law well stated, in *Johnson v. Johnson*, 3 Bos. & P. 162." "Had the plaintiff bid off the cow at one price, and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case. But such was not the fact. And it seems to us very clear that the contract was entire; that it was incapable of severance; that it could not be enforced in part and rescinded in part; and that it could not be rescinded without placing the parties *in statu quo*."]]

to discharge the debtor, unless it be made by such third person as agent for and on account of the debtor, and with his prior authority or subsequent ratification. (*e*)

And where payment is made by a third person for the debtor, but without any authority from the debtor, it is competent for the creditor and the person who made the payment, to rescind the transaction at any time before the debtor has affirmed the payment, and to repay the money; and thereupon the payment is at an end, and the debtor becomes again responsible. (*f*)

2. We shall see, hereafter, that if one of several plaintiffs, or a nominal plaintiff suing for a person who is beneficially interested, fraudulently, and by collusion with the defendant, give him a release from the debt, the court will, on summary application, set such release aside. (*g*) And so it is held, that if one of two plaintiffs fraudulently give a receipt to the defendant, this fact may be shown upon the trial, in order to destroy its effect. (*h*)

So where goods have been sold by a pretended owner, payment to the real owner is a discharge. (*i*)

Payment to a general agent, although he be known to be only an agent, binds the principal, provided such payment be made in the ordinary course of business, and before the principal requires payment to himself. (*k*)

But where an agent — *e. g.* a factor or an auctioneer — has a lien on the proceeds of goods sold by him, it is no defence to an action by him for the price, that the buyer paid the principal before action brought. (*l*)

(*e*) Per Cur. *Simpson v. Eggington*, 10 Exch. 845, 847; and see *Lucas v. Wilkin-*
son, 1 H. & N. 420.

(*f*) See per Martin B. *Walter v. James*,
L. Rep. 6 Ex. 124, 128.

(*g*) *Post*, tit. Release. See per Tindal
C. J. *Crook v. Stephens*, 7 Scott, 848, 852;
Tidd, 9th ed. 677; *Montstephen v. Brooke*,
1 Chit. 391; *Alner v. George*, 1 Camp.
392; *Barker v. Richardson*, 1 Y. & J. 362.
[Payment to a nominal plaintiff, of a judg-
ment recovered in his name, is not a sat-
isfaction of the debt. *Triplett v. Scott*,
12 Ill. 137.]

(*h*) *Farrar v. Hutchinson*, 9 A. & E.
641; *Skaife v. Jackson*, 3 B. & C. 421.

(*i*) *Allen v. Hopkins*, 13 M. & W. 94.

(*k*) *Coates v. Lewis*, 1 Camp. 444;
Drinkwater v. Goodwin, Cowp. 251;
Favenc v. Bennett, 11 East, 36; *Moore v.*
Clementson, 2 Camp. 24; *Gardner v.*
Davis, 2 C. & P. 49; *Hornby v. Lacy*, 6
M. & S. 166. [See *Patten v. Fullerton*,
27 Maine, 85. So, payment made to a
person to whom the money was agreed to
be paid, at the time of a sale, the authority
of the agent not being revoked, will dis-
charge the purchaser. *Marsh v. Laforest*,
1 La. Ann. 7.]

(*l*) *Robinson v. Rutter*, 4 E. & B. 954.

So payment to the plaintiff's attorney who is employed to recover the debt, is as effectual as if made to the plaintiff himself; (*m*) but payment to an agent of the plaintiff's attorney, who was employed by such attorney to sue the defendant, is no payment to the plaintiff. (*n*)

In an action for goods sold, it appeared that the defendant had paid the debt at the plaintiff's counting-house, to a person who was sitting there, in a part railed off, with account books near him, and who was apparently intrusted with the conduct of the business; and Lord Tenterden C. J. held, that this was a good payment to the plaintiff, although the person to whom the money was paid had not, in fact, any authority to receive it. (*o*)

Where an auctioneer is employed to conduct a sale, his authority to receive payment depends, in the absence of proof of a general authority, upon the conditions of sale. (*p*)

But possession by the vendor's solicitor, of the deed of conveyance executed, and with the receipt for the purchase-money indorsed, does not *per se* authorize him to receive the purchase-money. (*q*)

And payment to a broker will not, in general, bind his principal. (*r*) But it may do so by the custom of trade, or because such payment is warranted by the course of dealing between the parties. (*s*)

So possession by an agent of a mortgage deed, and an authority by him to receive payment of the interest reserved thereby, do not *per se* authorize him to receive payment of the principal. (*t*)

(*m*) *Powel v. Little*, 1 Bl. 8; *Yates v. Freckleton*, 2 Dougl. 625; [*Hudson v. Johnson*, 1 Wash. 9; *Branch v. Burnley*, 1 Call, 147; *Brackett v. Norton*, 4 Conn. 517; *Erwin v. Blake*, 8 Peters (U. S.), 18. But an attorney has no right to receive payment for his client in anything but money; and he has no right to take part for the whole. *Savoury v. Chapman*, 8 Dowling, 656; *Kirk v. Glover*, 5 Stew. & Port. 340; *Carter v. Talcott*, 10 Vt. 471; *Gullett v. Lewis*, 3 Stew. 23; *Kellogg v. Gilbert*, 10 John. 220.] Payment to plaintiff in fraud of his attorney. *Morrison v. Summers*, 1 B. & Ad. 559; *Tidd*, 9th ed. 97, 337.

(*n*) *Yates v. Freckleton*, 9 Ves. 234; [*Kellogg v. Norris*, 5 Eng. 18. Payment

to a sheriff employed by an attorney to serve a writ, will not discharge the debt. *Green v. Lowell*, 3 Greenl. 373; *Waite v. Delesdernier*, 15 Maine, 144.]

(*o*) *Barrett v. Deare*, Moo. & M. 200. See *Wilmot v. Smith*, Ib. 238; S. C. 3 C. & P. 453.

(*p*) *Sykes v. Giles*, 5 M. & W. 645, 651.

(*q*) *Viney v. Chaplin*, 27 L. J. C. 434.

(*r*) *Jackson v. Jacob*, 5 Scott, 79, 86; *Mynn v. Joliffe*, 1 Moo. & Rob. 326.

(*s*) *Baring v. Corrie*, 2 B. & Ald. 137, 147; *Russell on Factors*, 68.

(*t*) *Wilkinson v. Candlish*, 5 Exch. 91; and see *Kent v. Thomas*, 1 H. & N. 473.

Nor will payment to an agent bind the principal, unless it be made in the usual course of business. (*u*) Thus, if a shopman, who is authorized to receive money over the counter only, receive money elsewhere than in the shop, such payment is not good. (*x*)

So, an agent cannot, in general, bind his principal by receiving payment otherwise than in money, as by taking a bill of exchange in payment; unless he was expressly authorized so to do, or unless it was customary, in like cases, to settle by bill. (*y*)

But a creditor may discharge his debtor, by taking the security of the agent of the latter, and giving him a receipt, and inducing the principal, the debtor, to treat the demand as satisfied, whereby he is injured by dealing differently with his agent. (*z*)

So, although a traveller, who receives orders for goods from his employer's customer in the country, is authorized to receive payment for them in *money*, he has no power to receive such payment in other goods. (*a*)

Nor is the principal affected by a set-off which the vendee may have against the agent, (*b*) unless this mode of dealing be sanctioned by some known usage; (*c*) or where the agent has been allowed to sell as apparent principal. (*d*) Nor can the debtor discharge his debt to the principal, by writing off a debt due to him, the debtor, from the agent. (*e*)

Payment to the wife of the plaintiff will not bind him, unless it be shown that she had authority to receive such payment. (*f*)

In general, payment to one of two partners binds both (*f*¹) even

(*u*) See *Sanderson v. Bell*, 2 C. & M. 304.

(*x*) Per Cur. *Kaye v. Brett*, 5 Exch. 269, 274.

(*y*) See *Williams v. Evans*, L. Rep. 1 Q. B. 352; *Sykes v. Giles*, 5 M. & W. 645; *Ward v. Evans*, 2 Ld. Raym. 928; S. C. Salk. 442; *Thorold v. Smyth*, 11 Mod. 71, 88; *Townsend v. Inglis*, Holt N. P. 278; *Russell on Factors*, 58, 59.

(*z*) *Wyatt v. Marquis of Hertford*, 3 East, 147; *Marsh v. Pedder*, 4 Camp. 257.

(*a*) *Howard v. Chapman*, 4 C. & P. 508.

(*b*) *Bartlett v. Pentland*, 10 B. & C. 760.

(*c*) See *Scott v. Irving*, 1 B. & Ad. 605; *Sweeting v. Pearce*, 7 C. B. N. S. 449; S. C. (in Cam. Scac.) 9 Ib. 534; *Stewart v. Aberdeen*, 4 M. & W. 211; *Catterall v. Hindle*, L. Rep. 2 C. P. 368. As to the power of a policy-broker to receive payment of a loss otherwise than in money, see *Russell on Factors*, 112.

(*d*) See *Isberg v. Bowden*, 8 Exch. 852, 859; *Pratt v. Willey*, 2 C. & P. 350.

(*e*) *Underwood v. Nicholls*, 17 C. B. 239.

(*f*) *Offley v. Clay*, 2 M. & G. 172; 2 Scott N. R. 372; [*Thrasher v. Tuttle*, 22 Maine, 335.]

(*f*¹) [So, where a written contract is entered into by an individual for the doing

after a dissolution of partnership, and although the debtor had notice, before he paid the money, that the partners had appointed a third person to collect the debts due to the firm, — unless, that is, there be something in the notice which expressly takes away the power of the one partner to receive the money. (g) But where money is paid into a bank on the joint account of persons who are not partners, the bankers are not discharged by payment to one of those persons, without the authority of the others. (h)

Payment to one of several *executors* is sufficient; (i) and payment to a *feme covert* executrix, before probate, is good, as against her co-executor, although the husband dissent to her administering; provided the debtor was not aware of this when he made the payment. (k)

So it appears, that payment to an administrator, where letters of administration have been granted, discharges the debtor, although there be a will. (l)

And by the 20 & 21 Vict. c. 77, s. 77, it is enacted, that where any probate or administration is revoked under that act, all payments *bonâ fide* made to any executor or administrator, under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same.

Payment of a debt to one of two trustees is a good discharge as to both. (m) But where trustees, or other persons, have a joint account with a banker, it is usual to require the authority of all before paying the money. And accordingly it has been held, that a payment by bankers to one of several trustees, of the proceeds of stock sold out under a *joint* power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless they authorized such payment. (n)

of a job of work, in a suit by him to recover for the work done, it is competent to the defendant to show that the plaintiff had a partner in the job, and to prove payment to such partner in full. *Shepard v. Ward*, 8 Wend. 542.]

(g) *Porter v. Taylor*, 6 M. & S. 156.

(h) *Innes v. Stephenson*, 1 Moo. & Rob. 145. [But see *Morrow v. Starke*, 4 J. J. Marsh. 367.]

(i) Per Lord Hardwicke, *Carr v. Read*, 3 Atk. 695; 2 Wms. on Ex'ors, 620.

(k) *Pemberton v. Chapman*, 7 E. & B. 210; S. C. (in Cam. Scac.) E., B. & E. 1056.

(l) *Prosser v. Wagner*, 1 C. B. N. S. 289; and see *Allen v. Dundas*, 3 T. R. 125.

(m) *Husband v. Davis*, 10 C. B. 645.

(n) *Stone v. Marsh*, R. & M. 364; *Husband v. Davis*, *supra*.

Payment to one of several *assignees* of a bankrupt, seems to have been considered by Lord Hardwicke not to be good; (*o*) but Lord Kenyon expressed, at nisi prius, a different opinion. (*p*)

So, if a customer sue his banker for money lent, it is no defence on the part of the latter, either as payment or set-off, that he paid the amount to the holder of a bill of the customer, made payable at the bank, — provided such holder claimed through a forged indorsement, and was therefore incapable, according to the law-merchant, of giving a good discharge for the bill. (*q*)

Nor does payment by the drawer, to the holder of a bill of exchange, discharge the acceptor except in the case of an accommodation bill. (*r*)

But payment into the court of admiralty of a sum due for freight, under a monition commanding the defendant to bring the amount into the registry of that court, to abide the judgment of the court in a suit by the obligee of a bottomry bond, given by the master on the hypothecation of the ship and freight, is a good bar to an action for such freight. (*s*) And so a plea, showing that the defendant has been compelled to pay the sum claimed in the action, under a process of attachment, issued against him as garnishee, out of the mayor's court of London; (*t*) or out of a foreign court; or under an order for attachment of debts, made by virtue of the 17 & 18 Vict. c. 125, ss. 61, 62, is a good bar to that action. (*u*)

(*o*) Carr v. Read, 3 Atk. 695; and see Williams v. Walsby, 4 Esp. 220.

(*p*) Smith v. Jameson, 1 Esp. 114; Bristow v. Eastman, Ib. 174.

(*q*) Roberts v. Tucker, 16 Q. B. 560, 579. But in the case of a draft or order drawn on a banker, for a sum payable to order on demand, it is a sufficient authority to the banker, to pay such sum to the bearer of the draft or order, if the same purport to be indorsed by the person to whom it is drawn payable. 16 & 17 Vict. c. 59, s. 19.

(*r*) Jones v. Broadhurst, 9 C. B. 173; Lazarus v. Cowie, 3 Q. B. 459; Randall v. Moon, 12 C. B. 261; and see Cook v. Lister, 13 C. B. N. S. 543.

(*s*) Place v. Potts, 8 Exch. 705; affirmed in Cam. Scac. 10 Exch. 370; in Dom. Proc. 24 L. J. Exch. 225.

(*t*) It is a good replication to such a plea that, at the time of levying the plaint in the mayor's court, the person named therein as defendant was dead. Matthey v. Wiseman, 18 C. B. N. S. 657.

(*u*) Westoby v. Day, 2 E. & B. 605; Wood v. Dunn (in Cam. Scac.), L. Rep. 2 Q. B. 73; Gould v. Webb, 4 E. & B. 933; 17 & 18 Vict. c. 125, §. 65. *Quære*, whether, under this statute, there must not be a judge's order for payment. Turner v. Jones, 1 H. & N. 878.

3. The payment of *part* of a liquidated and ascertained sum is, in law, no satisfaction of the whole; although it may, in certain circumstances, be evidence of a gift of the remainder. (x) And a plea which alleged the payment by the defendant, and receipt by the plaintiff, of a smaller sum, in satisfaction of a liquidated and ascertained sum of larger amount, would be bad even after verdict. (y)

(x) Per Parke B. *Sibree v. Tripp*, 15 M. & W. 23, 33.

(y) *Cooper v. Parker*, 15 C.B. 822, 825, 828; *Down v. Hatcher*, 10 A. & E. 121; *Cumber v. Wane*, Str. 426; *Fitch v. Sutton*, 5 East, 232; *Lewis v. Jones*, 4 B. & C. 513; and see *Thomas v. Heathorn*, 2 B. & C. 477, 482; [*Seymour v. Minturn*, 17 John. 169; *Johnson v. Brannan*, 5 John. 271; *Dederick v. Lehman*, 9 John. 333; *Jones v. Bullitt*, 2 Litt. 49; *Geiser v. Kershner*, 4 Gill & J. 305; *Hardey v. Coe*, 5 Gill, 189; *Brooks v. White*, 2 Met. 283; 4 Chand. Law Rep. 30, 31; *Wheeler v. Wheeler*, 11 Vt. 60; *Bailey v. Day*, 26 Maine, 88; *White v. Jordan*, 27 Maine, 370; *Lee v. Oppenheimer*, 32 Maine, 254; *Eve v. Mosely*, 2 Strobhart, 203; per Curiam, *Twitchell v. Shaw*, 10 Cush. 48; *Tuttle v. Tuttle*, 12 Met. 554. Upon the old English doctrine on this subject, Huston J. in the case of *Milliken v. Brown*, 1 Rawle, 397, 398, makes the following observations: "It has become too common for men, even of good character and principles, but who trade on borrowed capital, to fail, and their creditors are glad to receive fifty cents in a dollar, and give a discharge in full; and I do not know the lawyer who would be hardy enough to deny the validity of such discharge, although given after the money was due, and although the discharge was not under seal, or although it might be doubtful whether it could more properly be called a receipt, or a release, or a covenant never to sue; if the meaning can be certainly ascertained, and there were no fraud, concealment, or mistake, at the giving, it is effectual. Universally the law is, or ought to be, that the meaning or intention of the parties, if it can be distinctly known,

is to have effect, unless that intention contravene some well established principle of law." See *Austin v. Smith*, 39 Maine, 203. In *Langdon v. Langdon*, 4 Gray, 189, Shaw C. J. said: There is a rule of law, that a mere money debt cannot be discharged by payment of a sum less than the actual debt, "but being somewhat harsh, contrary to the apparent intentions of parties, in making a compromise settlement, and not in harmony with the dictates of natural justice, it is to be construed strictly." The receipt of one thing in satisfaction of another, is a good payment; as the acceptance of a horse in lieu of a sum of money; or, of a bond by a third person, in discharge of a prior obligation. Per M'Kean C. J. *Musgrove v. Gibbs*, 1 Dallas, 217; *Brooks v. White*, 2 Met. 285, 286; *Jones v. Bullitt*, 2 Littell, 49; *Blin v. Chester*, 5 Day, 359; *Watkinson v. Ingleby*, 5 John. 386; *Eaton v. Lincoln*, 13 Mass. 424; *Bowker v. Harris*, 30 Vt. 424; *Perkins v. Lockwood*, 100 Mass. 249; *post*, "Accord and Satisfaction." And if a creditor choose to compel a payment of part of his claim by process of law, this will operate as an extinguishment of the whole; the rule being that he cannot split up an entire cause of action, so as to maintain two suits upon it. If he do so, a recovery in the first suit, although for less than his whole claim, is a bar to another suit for the residue. *Ingraham v. Hall*, 11 Serg. & R. 78; *Smith v. Jones*, 15 John. 229; *Willard v. Sperry*, 16 John. 121; *Phillips v. Berick*, 16 John. 136. Therefore, where a party, having a demand for three tons of hay, delivered in pursuance of one contract, sues, and recovers judgment for one ton, he cannot bring a suit for the remainder, but loses it. *Miller v. Co-*

Nor does it make any difference, that the creditor agreed to receive the smaller sum in full discharge of the whole demand, and gave a receipt accordingly. Thus, in *Walters v. Smith*, (*z*) B. and C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he got a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of suit. This was agreed to, and a receipt was given for the sum paid, which was stated to be for debt and costs in *that action*. A. afterwards sued C.; and it was held, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and therefore that it was no defence for C. (*a*) [But where a creditor of three joint debtors accepted from one of them one third of the debt with intent to relieve him entirely from the demand; this was held to operate as a release in his favor, and, therefore, in favor of the other two also.] (*a*¹)

There are, however, some exceptions to this rule. Thus the payment of part *before* the day, or in a particular manner not provided for by the original agreement, may amount to a satisfaction of the whole debt, if the parties so agree. (*b*) *E. g.* a plea of payment to the plaintiff of part of the sum claimed, and of the residue to a trustee for the plaintiff and the defendant, who was to retain it until the settlement of certain differences between them as to the amount really due; has been held a good plea. (*c*) So, if the claim be for an unliquidated demand, payment of a smaller sum may, by agreement, operate as a satisfaction of the whole. (*d*) So, there can be no doubt that if a *stranger*, out of his own moneys, pay a creditor part of his demand, under an express agreement that it shall be received in full

When payment of part sufficient.

vert, 1 Wend. 487.] By the 15 & 16 Vict. c. 76, s. 75, pleas of payment are to be taken distributively.

(*z*) 2 B. & Ad. 889.

(*a*) And see *Field v. Roberts*, 8 A. & E. 90.

(*a*¹) [*Milliken v. Brown*, 1 Rawle, 391. See the remarks of Huston J. in this case quoted, *ante*, 1101, note (*y*).]

(*b*) See *Sibree v. Tripp*, 15 M. & W. 23, 34; Co. Litt. 212 b.; *Pinnel's case*, 5 Co. 117; *Abbot v. Chapman*, 2 Lev. 81;

Covill v. Jeffery, 2 Roll. 96; *Fitch v. Sutton*, 5 East, 232, 233; *Thomas v. Heathorn*, 2 B. & C. 482; [*Brooks v. White*, 2 Met. 283; *Lee v. Oppenheimer*, 32 Maine, 253; *Goodnow v. Smith*, 18 Pick. 414; *Reid v. Bartlett*, 19 Pick. 273; *Smith v. Brown*, 3 Hawks, 580; *Rose v. Hall*, 26 Conn. 392.]

(*c*) *Page v. Meek*, 3 B. & S. 259.

(*d*) *Wilkinson v. Byers*, 1 A. & E. 106; *Sibree v. Tripp*, 15 M. & W. 23; [*McDaniels v. Lapham*, 21 Vt. 223.]

satisfaction of all claims on the debtor; the creditor cannot afterwards maintain an action for the remainder, as this would be a fraud on him who paid the money. (e) And the case of the acceptance of a smaller sum, as a composition on a debt, under an arrangement by a debtor with his creditors generally, also constitutes an exception to the above rule. (e¹)

And when the defendant relies on a payment made after action brought, he must plead and prove that such payment was made and received, in satisfaction of the amount claimed, together with damages and costs. (f)

Payment
after action
brought.

4. But the payment of money will sometimes be presumed, from lapse of time and other circumstances; and such presumption will operate as a defence, although the statute of limitations has not been pleaded. (g) Thus, a receipt for rent due on a certain day, is strong presumptive evidence that all rent previously due has been discharged. (h) So, where the plaintiff had ceased, for two years, to work for the defendant, and had then brought an action against the defendant for work and labor done for him; it was held, that proof that the plaintiff and other workmen who were employed by the defendant upon the

When pay-
ment pre-
sumed.

(e) *Lewis v. Jones*, 4 B. & C. 506, 514; *Welby v. Drake*, 1 C. & P. 557; [*Brooks v. White*, 2 Met. 283; *Kellogg v. Richards*, 14 Wend. 116; *Sanders v. Branch Bank*, 13 Ala. 353; *Boyd v. Hitchcock*, 20 John. 76.]

(e¹) [Per *Huston J.* in *Milliken v. Brown*, 1 Rawle, 397, 398; *Hinckley v. Arey*, 27 Maine, 362; *Cutler v. Reynolds*, 8 B. Mon. 596; *Shaw C. J.* in *Langdon v. Langdon*, 4 Gray, 189.]

(f) See *Ash v. Pouppeville*, L. Rep. 3 Q. B. 86; *Thame v. Boast*, 12 Q. B. 808; *Beaumont v. Greathead*, 2 C. B. 494; *Goodwin v. Cremer*, 18 Q. B. 757; *Cook v. Hopewell*, 11 Exch. 555.

(g) *Cooper v. Turner*, 2 Stark. 497; *Douthwaite v. Tibbut*, 5 M. & S. 75; *Duffield v. Creed*, 5 Esp. 52.

(h) *Gilb. Ev.* 309. [That a highway tax of one year was not included in a bill for the next, raises the presumption that it was paid; but this presumption may be repelled. *Attleborough v. Middleborough*,

10 Pick. 378. A. having a demand against B., pays him money and takes a receipt in full of all accounts; A.'s demand shall be presumed paid. *Alvord v. Baker*, 9 Wend. 323. Every officer engaged in the United States service is presumed to have received the compensation allowed by law. *United States v. Ripley*, 7 Peters, 18. An order to pay money is, in the hands of the drawee, evidence of payment. *Blount v. Starkey*, 1 Taylor, 110; *Weidner v. Schweighart*, 9 Serg. & R. 385. As to an order for goods in this respect, see *Alvord v. Baker*, 9 Wend. 323; *Price v. Justrobe*, 1 Harper, 111; *Blount v. Starkey*, 1 Taylor, 110. The drawee paying a money order is, *primâ facie*, an act of payment. Per *Sutherland J.* in *Alvord v. Baker*, 9 Wend. 324. One gives a bond to convey land, there being no counter bond for the consideration money; the presumption is, that the money was paid. *Mitchell v. Maupin*, 3 Monroe, 187.]

same terms, had come regularly every week to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, was sufficient to raise a presumption that his wages had been paid. (*i*) And, it seems, that if a domestic servant has left his master for a considerable period, without making any claim for wages, that fact will raise a presumption that his wages have been paid. (*k*)

So, where a servant was in the habit of receiving payment for milk sold by him for his master; and the practice was, for the servant to pay over to the master, from time to time, the moneys so received, without any written vouchers passing between them; it was held that this raised a presumption, that all sums so received by the servant had been paid over to the master. (*l*)

So, even at common law, a specialty debt was presumed to be satisfied after twenty years, unless circumstances rebutting that inference were proved by the obligee. (*m*)

So, where the defendant, who had ordered goods for *ready money*, paid for them by returning to the vendor's agent a dishonored bill, accepted by the vendor; and the agent at first declined to receive the bill as payment; but afterwards took it to the vendor, who kept

(*i*) *Lucas v. Novosilieski*, 1 Esp. 296.

(*k*) *Sellen v. Norman*, 4 C. & P. 81.

(*l*) *Evans v. Birch*, 3 Camp. 10.

(*m*) See the cases, Tidd, 9th ed. 18. See now 3 & 4 Will. 4, c. 42, s. 3. [Forbearance of a judgment debt for twenty years, unexplained, raises a presumption of payment. The reason of that rule is, that a man will naturally enjoy what belongs to him, if not prevented by some impediment, which renders that reason inapplicable to the case. *Boardman v. De Forest*, 5 Conn. 2; *Staniford v. Tuttle*, 4 Vt. 82; *Rogers v. Judd*, 5 Vt. 236. The insolvency of the debtor constitutes such an impediment; but the insolvency of one of two joint debtors, the other being absent, does not. *Boardman v. De Forest*, *ubi supra*. So, the absence of the debtor from the state, constitutes such an impediment; but the absence of one or two joint debtors, the other being present and accessible to creditors, does not. *Ib.*; *Dunning v. Chamberlain*, 6 Vt. 127; *Daggett*

v. Fallman, 8 Conn. 168. The absence requisite to constitute such an impediment, must, in its nature, be permanent, and not merely occasional. *Ib.* See, also, *Jackson v. Hotchkiss*, 6 Cowen, 401; *Jackson v. Slater*, 5 Wend. 295; *Jackson v. Sackett*, 7 Wend. 94; *M'Dowell v. M'Cullough*, 17 Serg. & R. 51. After a lapse of twenty years, bonds and other specialties, merchants' accounts, legacies, mortgages, judgments, and indeed all evidences of debt excepted out of the statute of Pennsylvania, are presumed to be paid. Per Sergeant J. in *Foulk v. Brown*, 2 Watts, 214. See *Diemer v. Secrist*, 1 Penn. 420. But payment of a bond will not be presumed from lapse of time alone, within a shorter period than twenty years. *Cottle v. Payne*, 3 Day, 289; *Mattocks v. Bellamy*, 8 Vt. 463; *Rix v. Smith*, 6 Ib. 348; *Forsyth v. Ripley*, 2 Greene (Iowa), 181. See the cases on this head collected in 2 Phil. Ev. (Cowen & Hill's ed.) 316 *et seq.*, notes, part 1.]

it; it was held, in an action by the assignee of the vendor, that this was equivalent to payment, no fraud being proved. (*n*)

So if, in an action by the drawer against the acceptor of a bill of exchange, the plaintiff produce the bill, and there be a general receipt on the back of it, this is *primâ facie* evidence that the bill was paid, not by the plaintiff, but by the defendant. (*o*) But the production of a bill of exchange from the custody of the acceptor, is not even *primâ facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted. (*p*) And it has also been held, that payment is not to be presumed, in such a case, from the fact of there being a receipt indorsed on the bill, unless such receipt be shown to be in the handwriting of a person who was entitled to demand payment. (*p*)

And if it appear that the defendant has drawn a check on his banker, payable to the plaintiff or bearer, and that the plaintiff or his agent has actually received the money thereon; or, even if it appear that payment of the check was refused, but such refusal is not proved to have taken place before action brought; (*q*) this will entitle the defendant to call upon the plaintiff to show, that the check was drawn on some other account than the debt sued for, (*r*) even although there be no proof that the plaintiff received such check from the defendant. (*s*)

5. A check operates as payment, until it has been presented and refused. (*t*) But the mere fact of the plaintiff having in his hands, at the time the action was brought, a check drawn in his favor by the defendant on account of the debt sued for, will not operate as payment of that debt, unless the check be unconditional. (*u*)

(*n*) *Mayer v. Nias*, 1 Bing. 311.

(*o*) *Scholey v. Walsby*, Peake, 25.

(*p*) *Pfiel v. Vanbatenberg*, 2 Camp. 439.
[See *Blount v. Starkey*, 1 Taylor, 110;
Weidner v. Schweighart, 9 Serg. & R. 385;
Alvord v. Baker, 9 Wend. 324.]

(*q*) *Per Patteson J. Pearce v. Davis*, 1 Moo. & Rob. 365, 366.

(*r*) *Pearce v. Davis*, 1 Moo. & Rob. 365;
Boswell v. Smith, 6 C. & P. 60; *Egg v. Barnett*, 3 Esp. 196; [*Patton v. Ash*, 7 Serg. & R. 116.] When payment of the check must be proved, although it came back into the hands of the maker; *Bleasley v. Crossley*, 3 Bing. 430. [A bank-book

of one of the parties would be evidence in such a case; but the handwriting of the clerk of the bank, who made the entries, must be proved, in case of his death. *Patton v. Ash*, 7 Serg. & R. 116.]

(*s*) *Mountford v. Harper*, 16 M. & W. 825.

(*t*) *Per Patteson J. Pearce v. Davis*, 1 Moo. & Rob. 365, 366. As to the effect of laches in presenting a check for payment, see *Hopkins v. Ware*, L. Rep. 4 Ex. 268; *Robinson v. Hawksford*, 9 Q. B. 52; *Alexander v. Burchfield*, 7 M. & G. 1061, 1067; *Serle v. Norton*, 2 Moo. & Rob. 401.

(*u*) *Hough v. May*, 4 A. & E. 954.

If money be sent by post, in a letter properly directed to the creditor, (x) and be lost, the debtor is discharged, if he were directed so to transmit the money, or if that were the usual course between the parties. (y)

Money sent
by post.

But where the defendant, in answer to a letter demanding payment, sent a post-office order to the plaintiff, in which the latter was described by a wrong Christian name; and the plaintiff kept the order, but did not cash it, although he was informed at the post-office that he might receive the money at any time, by signing it in the name of the payee; it was held, that this was no evidence of payment. (z)

Post-office
order.

And so, if a payment be made in *forged* Bank of England notes, the creditor may treat them as a nullity, and sue his debtor for the amount. (z¹)

Forged notes.

[Where a check was drawn on a bank on account of a debt due to the drawee, and the check was never presented to the bank for payment, but was afterwards lodged by the drawee in the hands of the drawer's clerk; it was held, that this was no payment. *Dennie v. Hart*, 2 Pick. 204. A check given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. *Cromwell v. Lovett*, 1 Hall, 56; *The People v. Baker*, 20 Wend. 602. The holder of a check in such a case becomes the agent of the drawer to collect the money; and if guilty of no negligence causing an actual injury to the drawer, he will not be answerable, if, from any peculiar circumstances attending the bank, the check is not paid. *Cromwell v. Lovett*, 1 Hall, 56. In a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity, and resort to his original cause of action. *Cromwell v. Lovett*, 1 Hall, 56. If the drawer of a check have no funds in the bank upon which it is drawn, at the date of the check, it is not necessary for the holder to present such check at the bank for payment, in order to enable him to sustain an action upon it. *Franklin v. Vanderpool*, 1 Hall, 78. The drawing of a check under such

circumstances is, when unexplained, a fraud, which deprives the maker of all right to require presentment and demand of payment. *Ib.*; *Eichelberger v. Finley*, 7 Harr. & J. 381; *Cushing v. Gore*, 15 Mass. 74. A check need not be presented for payment on the day it is received. *The Merchants' Bank v. Spicer*, 6 Wend. 543; *Chitty Bills* (12th Am. ed.), 515, and notes; *Foster v. Paulk*, 41 Maine, 425. See *Woods v. Schreader*, 4 Har. & J. 276; *Sutcliffe v. M'Dowell*, 2 Nott & McC. 251; *Murray v. Judah*, 6 Cowen, 484; *Glenn v. Noble*, 1 Blackf. 104; *Mohawk Bank v. Broderic*, 10 Wend. 304; *Gough v. Staats*, 13 Wend. 540.]

(x) See *Walter v. Haynes*, R. & M. 149.

(y) See *Kington v. Kington*, 11 M. & W. 233, 235; *Warwick v. Noakes*, Peake, 67; *Hawkins v. Rutt*, *Ib.* 186; [*Wakefield v. Lithgow*, 3 Mass. 249.]

(z) *Gordon v. Strange*, 1 Exch. 477.

(z¹) [*Thomas v. Todd*, 6 Hill, 340; *Pin dall v. Northwestern Bank*, 7 Leigh, 617; *Ramsdale v. Horton*, 3 Barr, 330; *Young v. Adams*, 6 Mass. 182; *Mudd v. Reeves*, 2 Harr. & J. 368; *Hargrave v. Dusenbury*, 2 Hawks, 326; *Markle v. Hatfield*, 2 John. 455; *Keene v. Thompson*, 4 Gill. & J. 463; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Simms v. Clarke*, 11 Ill. 137; *Cabot Bank v. Morton*, 4 Gray, 156, 158.

We have seen that a debt will be *extinguished*, by the creditor's order upon his debtor to pay the money to a third person, to whom such creditor is indebted; and by such order being acted upon, and the third party receiving the amount in pursuance thereof. (a)

Creditor's order on his debtor to pay a third person.

And so, where the defendant is indebted to the plaintiff, and the plaintiff is indebted to A. and the three agree that the plaintiff shall be discharged from the debt due from him to A. and that the defendant's liability to the plaintiff shall be transferred to A.; this agreement may be pleaded by the defendant as a discharge, in an action against him for the debt due from him to the plaintiff. (b)

But if a debtor refer his creditor to a third person for payment, intending such third person to pay in money; and the creditor, instead of taking payment in money, take payment in any other way, he does so at his peril. (c)

Debtor's order on a third person to pay creditor.

The person who receives counterfeit bills and notes in payment of his debt, must return or offer to return them in a reasonable time, or he will forfeit his right to recover the amount of them of the payer. *Martin v. Roberts*, 5 Cush. 126; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Raymond v. Baar*, 13 Serg. & R. 318; *Pindall v. Northwestern Bank*, 7 Leigh, 617; *Simms v. Clark*, 11 Ill. 137. Where bank bills are received in payment, and at the time of such payment the bank which issued the bills has in fact stopped payment, although the failure is not at the time known at the place of payment, the loss falls upon the party paying, and not on the party receiving the bills. *Lightbody v. Ontario Bank*, 11 Wend. 9; *Ontario Bank v. Lightbody*, 13 Wend. 101; *Gilman v. Peck*, 11 Vt. 516; *Fogg v. Sawyer*, 9 N. H. 365; *Magee v. Carmack*, 13 Ill. 289; *Frontier Bank v. Morse*, 22 Maine, 88. He who receives a bill of a broken bank, not knowing it to be such, and on a representation made to him that it is worth its nominal value, does not take it at his own risk. *Commonwealth v. Stone*, 4 Met. 43. But it has been held in Alabama, that payment in discharge of a debt, in genuine bank-notes, if made *bonâ fide* and in ignorance of the failure of the

bank, is a valid payment; though at the time the notes might be valueless. *Lowrey v. Morrell*, 2 Porter, 280. See *Bayard v. Shunk*, 1 Watts & S. 92; *Scruggs v. Gass*, 8 Yerger, 175. In *Wainwright v. Webster*, 11 Vt. 576, the court holds a doctrine contrary to that of *Lowrey v. Morrell*, *supra*, under the same circumstances. See *Alexander v. Dennis*, 9 Porter, 174; *Brown v. Brabham*, 3 Ohio, 275. If a debtor steal money from his creditor, and then deliver it to his creditor, who accepts it in payment of the debt due to him, without knowing that it was stolen from him, it is no payment. *State Bank v. Wells*, 3 Pick. 394. A creditor is not bound to receive payment in currency, which is at a discount in the place where the debt is payable. *Howe v. Wade*, 4 McLean, 319. The fact that a note is made payable at a bank, does not render the notes of such bank receivable in payment. *Bull v. Harrell*, 7 Howard (Miss.), 9. But if a payment is made in bank bills and accepted, it is a good payment at their nominal par value. *Phillips v. Blake*, 1 Met. 156.]

(a) See *ante*, 912.

(b) Per Erle C. J. *Cochrane v. Green*, 9 C. B. N. S. 448, 467.

(c) But taking from the *debtor's agent* a check, instead of cash, does not discharge the debtor, if the check be dishonored;

Thus, where a creditor, who held the debtor's order upon a banker, instead of taking cash from the banker, as he might have done, elected to take from the latter a bill upon a third person, payable at a future day; it was held that this discharged the debtor, although the bill was afterwards dishonored. (*d*) So it has been held, that if a debtor refer a creditor to a third person for payment, and the creditor give that third person indulgence, without the knowledge and consent of the debtor; and the third person become insolvent, the loss must fall on the creditor; because, as between himself and the debtor, the giving indulgence, without notice, operates as an agreement on his part to look to the third person and discharge the debtor. (*e*) And where a creditor accepts the order of his debtor upon a third person, to pay him, the creditor, a sum of money, and holds it an unreasonable time before demanding payment; and the person on whom the order was given becomes insolvent, the creditor must bear the loss, even although the order was not negotiable. (*f*)

It was decided in the case of *Eyles v. Ellis*, (*g*) that an actual transfer of the amount of a debt, in a banker's books, from the account of the debtor to that of the creditor, with the assent of both, is equivalent to payment. In that case the plaintiff and defendant each kept an account with a banker at M. In October, the plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote to the plaintiff, stating that he had caused the amount to be transferred to his account, and the plaintiff sent him a receipt by return of post. The sum, however, was not actually transferred until the 8th of December. On the 9th, notice of the transfer was sent to the plaintiff by post, and it reached him on the 11th. On the 10th the banker stopped payment: and it was held, that the transfer was equivalent to payment.

But where a debtor wrote to his bankers, who had a balance in his favor in their hands, directing them to place a certain sum to the credit of his creditor, who was a customer of and debtor to the

Everett v. Collins, 2 Camp. 515; unless the creditor fails to present the check for payment within a reasonable time, and thereby alters for the worse the position of the creditor. *Hopkins v. Ware*, L. R. 4 Ex. 268.

(*d*) *Smith v. Ferrand*, 7 B. & C. 19, 24.

(*e*) Per Lord Kenyon, as stated by Bayley J. in *Smith v. Ferrand*, *supra*.

(*f*) *Chamberlyn v. Delarive*, 2 Wils. 353.

(*g*) 4 Bing. 112; and see *Bodenham v. Purchas*, 2 B. & Ald. 39.

bank, so as to make the payment the same as by a bill at one month from that date; and the bankers consented to this, and communicated their assent to the creditor, who also acquiesced; but before the expiration of the month, and before credit was in fact given for the money in their books, the bankers failed; it was held that this did not amount to a payment. (*h*)

So, if the plaintiff and defendant and a third person agree, that a sum of money belonging to such third person, but which is to come to the hands of the plaintiff, shall, when received, be applied by the plaintiff in discharge of a claim which he has against the defendant; and it appear that the money was duly received by the plaintiff; these facts will furnish evidence of a payment by the defendant in satisfaction of such claim. Thus, where the plaintiffs, who were sharebrokers, had sold shares for one H. for 415*l.* 12*s.* 6*d.*; but H., being in want of this money before the settling day, applied to the plaintiffs for it; whereupon the plaintiffs agreed to advance it, provided H. would procure the defendant's acceptance for the amount, — they, the plaintiffs, promising to appropriate the purchase-money for the shares, when received, in discharge of such acceptance; and the defendants, having consented to this arrangement, accepted the bill on the faith of it, and the plaintiffs received the purchase-money in due time: it was held, in an action by the plaintiffs against the defendants on the bill, — to which the defendants pleaded payment, — that proof of these facts supported that plea. (*i*) And so where the plaintiffs, being the holders of the joint and several promissory note of A. and B., received from C. a promissory note of the like amount, in satisfaction of B.'s liability on the former note; and C.'s note was afterwards paid by D.: it was held that these facts amounted to a payment by B. of such former note. (*k*)

Money of a third party coming to plaintiff's hands, applied by arrangement in payment of debt.

So where, on each half-year's settlement for rent between a landlord and his tenant, the landlord's sewers rate, which had been

(*h*) *Pedder v. Watt*, Peake Ad. Ca. 41; S. C. 2 Chit. 619. It will be remarked that, in this case, there was no remittance or actual transfer on account of the debt; but a mere direction to place money to account at a future day.

(*i*) *Hills v. Mesnard*, 10 Q. B. 266, 271.

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(*k*) *Thorne v. Smith*, 10 C. B. 659; and see *Parker v. Watson*, 8 Exch. 404, 409. [Payment and satisfaction of a note or an account may be made by the delivery and acceptance of an account against a stranger. *Willard v. Germer*, 1 Sandf. 50.]

paid by the tenant, was allowed as a part payment of the rent by the tenant, and a receipt given for the balance, expressing it to be such; this was held to place the parties in the same position, as if the amount had been actually paid in money to the landlord. (*l*)

Money paid for the creditor.

Allowance of cross-demands, and payment of balance.

So the allowance of cross-demands on an account stated between the plaintiff and the defendant, and payment of the balance by the latter, if pleaded specially, is good as a plea of payment. (*m*)

Payment in goods.

And, by agreement between the parties, payment may be made in goods, as well as in money. (*n*)

6. If a creditor have two distinct debts due to him from his debtor, and the latter make a general payment on account, without specifying, at the time, to which account he intends the payment to be applied; it is optional in the creditor to appropriate such payment to which account he pleases. (*n*¹) But if, at the time the debtor makes the payment, he declares that it is specifically made in discharge, or in part liquidation of a particular account; or if the circumstances show that

Appropriation of payments.

(*l*) *Waller v. Andrews*, 3 M. & W. 312, 318; *Bramston v. Robins*, 4 Bing. 11, 14.

(*m*) *Per Cur. Callander v. Howard*, 10 C. B. 290, 296; and see *Perry v. Attwood*, 6 E. & B. 691; *Smith v. Page*, 15 M. & W. 683; *Sutton v. Page*, 3 C. B. 204.

(*n*) See *Cannan v. Wood*, 2 M. & W. 465, 467; *Hooper v. Stephens*, 4 A. & E. 71; *Hart v. Nash*, 2 Cr., M. & R. 337; and see *Blair v. Ormond*, 17 Q. B. 423, 435; 20 L. J. Q. B. 444, 452; [*Borah v. Curry*, 12 Ill. 66; *post*, "Tender of Specific Articles."]

(*n*¹) [*Seymour v. Marvin*, 11 Barb. 80. The general rule laid down by Mr. Justice Story, with regard to the application of payments, is, that where a person owes money upon several distinct accounts, he has a right to direct his payments to be applied to either, as he pleases; if he pays money on his accounts generally, without appropriating it, the creditor may apply it as he pleases; if neither the debtor nor creditor makes any specific application of the money so paid, the law will appro-

priate it according to the justice and equity of the case. *Cremer v. Higginson*, 1 Mason, 338; *United States v. Wardwell*, 5 Mason, 85. See, also, *Pattison v. Hull*, 9 Cowen, 769, 771; *Baker v. Stackpoole*, 9 Cowen, 420; *Chitty v. Naish*, 2 Dowl. Prac. Cas. 511; *Mitchell v. Dall*, 4 Gill & J. 361; *Seymour v. Van Slyck*, 8 Wend. 403; *Niagara Bank v. Roosevelt*, 9 Cowen, 409; *Allen v. Kimball*, 23 Pick. 473; *United States v. Eckford*, 17 Peters, 251; *Brewer v. Knapp*, 1 Pick. 332; *Washington Bank v. Prescott*, 20 Pick. 339; *Blackstone Bank v. Hill*, 10 Pick. 129; *Mann v. Marsh*, 2 Caines, 99; *Reynolds v. McFarlane*, Overton, 488; *Arnold v. Johnson*, 1 Scam. 196; *Rosseau v. Bell*, 14 Vt. 83; *Selleck v. Sugar Hollow Turnp. Co.* 13 Conn. 453. Where there is no application, the court applies it to the case of the most precarious security. *Field v. Holland*, 6 Cranch, 8. Or to the oldest debt where there are several. *Milliken v. Tufts*, 31 Maine, 497; *Caldwell v. Wentworth*, 14 N. H. 431.]

such was his intention, the creditor is bound thereby, and he cannot apply it to any other demand. (o)

(o) *Waller v. Lacy*, 1 M. & G. 54, 70; 1 Scott N. R. 186, 200. See *Jones v. Gretton*, 8 Exch. 773; *Anon. Cro. Eliz.* 68; *Goddard v. Cox*, Str. 1194; *Newmarch v. Tealby*, 14 East, 239, 243, n. (a); *Peters v. Anderson*, 5 Taunt. 596; *Shaw v. Picton*, 4 B. & C. 715; [*Reed v. Boardman*, 20 Pick. 441; *Hall v. Marston*, 17 Mass. 575; *Gilchrist v. Ward*, 4 Mass. 692; *Bonaaffe v. Woodbury*, 12 Pick. 463; *Hussey v. Man. & Mech. Bank*, 10 Pick. 415; *Bosley v. Porter*, 4 J. J. Marsh, 621; *Hall v. Constant*, 2 Hall, 185, 189; *McDonald v. Pickett*, 2 Bailey, 617, 618; *Martin v. Draker*, 5 Watts, 544; *Boutwell v. Mason*, 12 Vermont, 608; *Pindall v. Bank of Marietta*, 10 Leigh, 481, 484; *Miller v. Trevilian*, 2 Rob. (Virg.) 2, 27. The creditor, if he receives the money, is bound by the application of it directed by the debtor, although he, at the time, and constantly afterwards, refuse to make the application directed. *Reed v. Boardman*, *ubi supra*. This direction of the debtor may be proved by circumstances, such as his denial of one of two debts claimed at the time of payment of money and admission of the other; so also the fact that the amount paid agreed with one of the demands and not with the other, would be an important circumstance. *Taylor v. Sandiford*, 7 Wheat. 14, 20; *Mitchell v. Dall*, 2 H. & Gill, 160, 173; *Roberts v. Garnie*, 3 Caines, 14; *Western Branch Bank v. Morehead*, 5 Serg. & R. 542; *Scott v. Fisher*, 4 Monroe, 387; *Stone v. Seymour*, 15 Wend. 19. As to the mode in which the application made by the creditor may be fixed and proved, see *Starrett v. Barber*, 20 Maine, 457; *Allen v. Kimball*, 23 Pick. 473; *Lindsey v. Stevens*, 5 Dana, 104. Upon the question of the time within which the creditor must make the application, there is some confusion among the authorities. But the weight of authority seems to allow the creditor to make the application at any time, as between himself and the debtor, but if the rights of third parties are concerned and affected by the time of application, the creditor should make it in a reasonable time. *Mayor &c. of Alexandria v. Patten*, 4 Cranch, 317; *Pattison v. Hull*, 9 Cowen, 747; *Bosanquet v. Wray*, 6 Taunt. 597; *Frazer v. Bunn*, 8 C. & P. 704. See *Philpott v. Jones*, 2 Ad. & El. 41; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffiths*, 5 M. & W. 300; *Brady v. Hill*, 1 Missou. 315; *Hilton v. Burley*, 2 N. H. 193; *Heilbron v. Bissell*, 1 Bailey Eq. 430; *Starrett v. Barber*, 20 Maine, 457. If the application is once made by the creditor he cannot change it. *Hill v. Sutherland*, 1 Wash. 128; *White v. Trumbull*, 3 Green, 314; *Hilton v. Burley*, 2 N. H. 123; *Seymour v. Marvin*, 11 Barb. 80. Whether application can be made by creditor after suit brought respecting it, see *Wilkinson v. Sterne*, 9 Mod. 427; *Bosanquet v. Wray*, 6 Taunt. 597; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffiths*, 5 M. & W. 300; *Alexandria v. Patten*, 4 Cranch, 317; *Brady v. Hill*, 1 Missou. 315; *Heilbron v. Bissell*, 1 Bailey Eq. 430. Whether such application can be made after controversy arisen, see *United States v. Kirkpatrick*, 9 Wheat. 737; *Wiggin v. Doolittle*, 12 Vt. 249; *Fairchild v. Holly*, 10 Conn. 184. In *Milliken v. Tufts*, 31 Maine, 497, it was held, that a creditor cannot appropriate a payment after a controversy has arisen thereon between himself and the debtor. See *Caldwell v. Wentworth*, 14 N. H. 431. For a statement of rules, by which courts will be governed when the application of payments devolves on them, see *Emery v. Tichout*, 13 Vt. 15, 17; *Stamford Bank v. Benedict*, 15 Conn. 438; *Portland Bank v. Brown*, 22 Maine, 295; *Smith v. Lloyd*, 11 Leigh, 517; *Heilbron v. Bissell*, 1 Bailey Eq. 435; *Bosanquet v. Wray*, 6 Taunt. 597. How far the court is to look to the interest of the creditor in making the application, see *Field v. Holland*, 6 Cranch, 8; *Hammer v. Rochester*, 2 J. J. Marsh. 414;

And the doctrine — as to the right of a creditor to appropriate general payments — holds, although one of the debts be due on a bond or other specialty, and the other be due on simple contract. (*p*) So, where the defendant owed money to the plaintiff, in respect of a debt contracted by his, the defendant's wife, *dum sola*, and also in respect of a debt incurred by him on his own account, and he paid money generally on account; it was held that the plaintiff might apply the payment to either demand. (*q*) And so, in the absence of any appropriation by the debtor at the time of making a payment, the creditor may apply it in satisfaction of a debt which is barred by the statute of limitations. (*r*)

This rule, however, applies only to the case of payments properly so called. And therefore, if the money was received by the plaintiff without the knowledge of the defendant, so that he never had the power of exercising the option which the law allows him; the right of the plaintiff, which would accrue upon the defendant's failure to appropriate, does not arise. (*s*)

But it is not essential that there should have been an *express declaration* by the debtor at the time of the payment, as to the account to which he intended such payment to be applied. (*s*¹) Such intention may be proved either by the previous or by the subsequent declarations of the debtor. (*t*) And even in the absence of any declaration on the subject, it may be collected from other circumstances, that the

Blanton v. Rice, 5 Monroe, 253; *Planters' Bank v. Stockman*, 1 Freeman Ch. (Miss.) 502; *Briggs v. Williams*, 2 Vt. 283; *Capen v. Alden*, 5 Met. 268; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 64.] The French law is to the same effect as ours, as to the right of the debtor at the time he pays, to direct to what account the money shall be applied; except that when a payment is made on account of a debt bearing interest, the money must be placed to the account of interest then due, and not to the account of principal, they being distinct; Code Civil, bk. 3, tit. 3, art. 1253, 1254. See 1 Pothier, by Evans, 368; and per Sir W. Grant, *Clayton's case*, 1 Mer. 605.

(*p*) See cases cited, *supra*, n. (*o*).

(*q*) *Goddard v. Cox*, Str. 1194.

(*r*) *Mills v. Fowkes*, 7 Scott, 444.

(*s*) Per Tindal C. J. *Waller v. Lacy*, 1 M. & G. 54, 70; 1 Scott N. R. 186, 200. [See *Blackstone Bank v. Hill*, 10 Pick. 129; *Commercial Bank v. Cunningham*, 24 Pick. 270; *Merrimack County Bank v. Brown*, 12 N. H. 320. But see *Portland Bank v. Brown*, 22 Maine, 295.]

(*s*¹) [*Mitchell v. Dall*, 4 Gill & J. 361; *Taylor v. Sandiford*, 7 Wheat. 20; *Stone v. Seymour*, 15 Wend. 31.]

(*t*) *Waters v. Tomkins*, 2 Cr., M. & R. 723. [See *Bayley v. Wynkoop*, 5 Gilman, 449. The account book of a creditor, together with evidence that the entries were made at the time they bear date, are competent evidence in his favor to show to which of two accounts he applied a general payment. *Van Rensselaer v. Roberts*, 5 Denio, 470.]

debtor intended, at the time of the payment, to appropriate it to a specific account. Where, therefore, A. — who had large demands against B. upon bill transactions with himself, and also as agent for several persons to whom B. had granted annuities secured by C. — caused an attorney to make application to B. and C. on behalf of these annuitants; and B., in consequence of that application and the remonstrances of C., paid certain sums of money to A., without making any specific appropriation of them at the time of payment; it was held, that A. must be considered as having received them on account of the annuitants; and that the latter were entitled to have those moneys divided amongst them, in proportion to the amount of their respective demands. (u)

Nor will an entry in the books of the creditor, applying a payment to a particular demand, preclude him from afterwards applying it to another demand, unless such entry has been communicated to the party paying. (x)

Creditor not concluded by entry in his books not communicated.

There are cases, however, in which, although a payment be general, the creditor is not allowed to apply it to which account he pleases.

Cases where creditor cannot appropriate a general payment.

Thus, where one account is with the debtor *as executor*, and the other in his own right, the law will apply the payment to the money due from himself individually, and will not allow the creditor to appropriate it to the other demand. (y)

So, it has been decided, that a general payment must be applied to a *prior legal* debt, and not to a subsequent equitable demand, as, for instance, to a claim by a partner against his copartner. (z)

(u) *Shaw v. Picton*, 4 B. & C. 715.

(x) *Simpson v. Ingham*, 2 B. & C. 65; [*Seymour v. Marvin*, 11 Barb. 80; *Dorsey v. Wagman*, 6 Gill, 59.]

(y) *Goddard v. Cox*, Str. 1194; [*Sawyer v. Tappan*, 14 N. H. 352.]

(z) *Goddard v. Hodges*, 1 C. & M. 33. But in *Bosanquet v. Wray*, 6 Taunt. 597, where the equitable demand accrued *before* the legal debt, it was held that the general payment might be placed to the account of the equitable claim; *sed qu.* [If one of the debtor's liabilities be contingent, as if his creditor be his indorser or security, not having paid the money, the latter can-

not apply the money paid to this account.

Per Woodworth J. delivering the opinion of the court in *Niagara Bank v. Roosevelt*, 9 Cowen, 409. See *Merrimack Co. Bank v. Brown*, 12 N. H. 321; *Portland Bank v. Brown*, 22 Maine, 295; *Newman v. Meek*, 1 Sm. & M. Ch. (Miss.) 331, 337. A general payment is referred to a debt due, rather than to one not due. *McDowell v. Blackstone Canal Co.* 5 Mason, 11; *Baker v. Stackpoole*, 9 Cowen, 420; *Stone v. Seymour*, 15 Wend. 19, 24; *Law v. Sutherland*, 5 Grattan, 357; *Hunter v. Osterhoudt*, 11 Barb. 33; *Caldwell v. Wentworth*, 14 N. H. 431; *Seymour v. Sexton*,

So, it was held, that if there were a debt which was contracted whilst the debtor was a trader within the bankrupt laws, and another which was contracted afterwards, and the debtor made a general payment; the law would apply such payment to the former demand, so as to prevent the creditor from obtaining a fiat in bankruptcy. (*a*)

So, the doctrine which we are now considering has never been held to authorize a creditor who receives money on account, to apply it towards the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment. (*b*) Thus, where the plaintiff had two demands against a corporation for work done; but one of those was held not to be valid, because the work had been done under a contract entered into by the corporation not under their common seal; the court of exchequer decided, that a payment which had been made by the corporation, generally, on account, could not be applied by the plaintiff in liquidation of that demand. (*c*) But in a similar case, where an attorney had a claim against a corporation in respect of several bills of costs, two of which were for business done for the corporation on a retainer not under their common seal; the court

10 Watts, 255. A payment may, however, by express agreement of parties, be appropriated to a debt not due. *Shaw v. Pratt*, 22 Pick. 305. In *Pattison v. Hull*, 9 Cowen, 747, it was held that if the debts be a mortgage and an account, and no application is made by either debtor or creditor of money paid generally, the law will apply the payment to the mortgage rather than to the account; because relief from the former will be most beneficial to the debtor. See *Field v. Holland*, 6 Cranch, 8; *Briggs v. Williams*, 2 Vt. 286; *Woodbury J. in Hilton v. Purley*, 2 N. H. 196; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 66; *Hammer v. Rochester*, 2 J. J. Marsh. 144; *Blanton v. Rice*, 5 Monroe, 253; *Smith v. Lloyd*, 11 Leigh, 517; *McTavish v. Carroll*, 1 Md. Ch. 160; *Dows v. Morewood*, 10 Barb. 183. Payments will be applied to those demands bearing interest in preference to those not bearing interest. *McTavish v. Carroll*, 1 Md. Ch. 160; *Bussey v. Gant*, 10 Humph. 238. If a debtor makes payment generally on a note, it applies first to extinguish the interest, and

the balance may be sued for as principal. *People v. Co. of New York*, 5 Cowen, 331; *Story v. Livingston*, 13 Peters, 360; *Dean v. Williams*, 17 Mass. 417; *Spires v. Hamot*, 8 Watts & S. 17; *Jones v. Ward*, 10 Yerger, 161; *Hart v. Dorman*, 2 Florida, 445. If there be two demands, and the debtor pays without appropriation an amount exceeding one of the demands, and exactly equal to what remains due on the other, it will be considered as having been paid in discharge of that other. *Roberts v. Garnie*, 3 Caines, 14. See *Caldwell v. Wentworth*, 14 N. H. 431.]

(*a*) *Meggott v. Mills*, 1 Ld. Raym. 286; *Dawe v. Holdsworth*, Peake, 64; *Peters v. Anderson*, 5 Taunt. 602; *Plomer v. Long*, 1 Stark. 155, note; *Ex parte Hunter*, 6 Ves. jun. 94.

(*b*) *Per Cur. Lamprell v. Guardians of Billericay Union*, 3 Exch. 283, 307; 18 L. J. Exch. 282, 287.

(*c*) *Lamprell v. Guardians of Billericay Union*, 3 Exch. 283, 307; 18 L. J. Exch. 282, 287.

of common pleas held, that the attorney had a right to appropriate a general payment in liquidation of these two bills; because his claim thereon was a just and equitable claim, although, from the absence of a contract under seal, it could not be made the subject of an action at law. (*d*)

And so, if a person have two demands upon another, one arising out of a *lawful* contract, the other out of a contract *forbidden by law*, and the debtor make a payment which is not specifically appropriated at the time, the law will apply it to the legal demand. (*e*) But this rule does not apply to cases in which the law, although it may prevent the party from suing on the contract, yet does not invalidate the contract itself. (*f*)

So if one partner in a firm owe a private debt to A., who is also a creditor of the firm, and he pay money of *the firm* generally on account; such payment is to be appropriated to the discharge of the partnership debt. (*g*)

It has been held, at nisi prius, (*h*) that, under a plea of payment to an action on a bond against the surety of the obligor, a payment by the obligor to the obligee, to whom the obligor was otherwise indebted, cannot be applied in favor of the surety, unless there be circumstances to show that such payment was intended to be made in discharge of the bond. (*i*) But where security had been given by a surety, for goods to be supplied to his principal, and not in respect to a previously existing debt; and goods were accordingly supplied, and payments from time to time made by the principal, in respect of some of which discount was allowed for prompt payment; it was inferred, in favor of the surety, that these payments were intended to be in liquidation of the latter account. (*k*)

A person who kept cash with a banker, deposited with him the

(*d*) *Arnold v. Mayor of Poole*, 4 M. & G. 860, 897.

(*e*) *Wright v. Laing*, 3 B. & C. 165. [See *Caldwell v. Wentworth*, 14 N. H. 431; *Bancroft v. Dumas*, 21 Vt. 456; *Rohan v. Hanson*, 11 Cush. 44.]

(*f*) *Mills v. Fowkes*, 7 Scott, 444. And see *Philpot v. Jones*, 2 A. & E. 41; and *Cruikshanks v. Rose*, 1 Moo. & Rob. 100, in which it was held, that although one of two demands was for spirituous liquors supplied in small quantities, contrary to 24 Geo. 2, c. 40, s. 12, yet the

creditor might apply a general payment to such demand, instead of to the other. [*Rohan v. Hanson*, 11 Cush. 44.]

(*g*) *Thompson v. Brown*, Moo. & M. 40. [See *Van Rensselaer v. Roberts*, 5 Denio, 470; *Fairchild v. Holly*, 10 Conn. 175; *Johnson v. Boone*, 2 Harring. 172.]

(*h*) *Plomer v. Long*, 1 Stark. 153; and see *Martin v. Brecknell*, 2 M. & S. 39; *Williams v. Rawlinson*, 3 Bing. 71, 76.

(*i*) See *Williams v. Rawlinson*, 3 Bing. 71, 76.

(*k*) *Marryatts v. White*, 2 Stark. 101.

note of a third person for a sum of money, telling him at the same time that it was a note made for his accommodation; and he afterwards paid a sum of money into the bank, without making any specific appropriation of it; and Lord Kenyon held, that this money must be placed, as far as it would go, towards the discharge of the then existing debt; and that the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money. (*l*)

If a creditor receive dividends upon a debt which is partly secured by the guaranty of a third person, the dividends must not be appropriated to the excess of the debt above the sum guarantied, but must be applied ratably to the whole debt. (*m*)

And accordingly, where the defendant guarantied the plaintiffs, against debts to be contracted by L. M. to the extent of 400*l.*, and L. M. became indebted to the plaintiffs to the amount of 625*l.*: upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, thereby leaving 356*l.* due to the plaintiffs, out of their whole claim: it was held, that the defendant was entitled to deduct from that sum 171*l.* 13*s.* 4*d.*, being the amount of the dividend of 8*s.* 7*d.* in the pound upon 400*l.* (*n*)

And, *primâ facie*, the doctrine as to the appropriation of payments does not apply where there are *not distinct* accounts; or where *separate accounts* are treated as one entire account by all parties. In such cases, therefore, payments made generally, are presumed to have been made in discharge of the *earlier* items of the account. (*o*)

Rule where there are not distinct accounts.

(*l*) *Hommersley v. Knowles*, 2 Esp. 66. [Where the maker of a note paid to the promisee sums of money on account of the note, and took his negotiable notes therefor; it was held that the money so paid was in payment of the note, and might be given in evidence as such. *Sargent v. Southgate*, 5 Pick. 312.]

(*m*) *Raikes v. Todd*, 8 A. & E. 846, 855.

(*n*) *Bardwell v. Lydall*, 7 Bing. 489.

(*o*) *Clayton's case*, 1 Mer. 572, 608; per Cur. *Wilson v. Hurst*, 4 B. & Ad. 760, 767; *Bodenham v. Purchas*, 2 B. & Ald. 45, 47; *Stoveld v. Eade*, 4 Bing. 154, 158; *Field v. Carr*, 5 Bing. 13; [*Dows v. More-*

wood, 10 Barb. 183; *United States v. Bradbury*, Davies's Rep. 146; *United States v. Kirkpatrick*, 9 Wheat. 720; *Postmaster General v. Furber*, 4 Mason, 336; *Baker v. Stackpoole*, 9 Cowen, 435; *Pemberton v. Oakes*, 4 Russ. 154; *Smith v. Wigley*, 3 M. & Scott, 174; *Gass v. Stinson*, 3 Sumner, 98; *McKenzie v. Nevins*, 22 Maine, 138; *Miller v. Miller*, 23 Ib. 24; *Fairchild v. Holly*, 10 Conn. 176; *Smith v. Lloyd*, 11 Leigh, 518. The rule stated in the text is applicable where such payments are made by one of *full age*, upon an account commencing *before* and terminating *after* the debtor's majority. *Thurlow v. Gilmore*, 40 Maine, 378. There are,

This rule is well illustrated by the following case: A bond was given to the several persons constituting the firm of a banking house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor. One of the partners died, and a new partner was taken into the firm; and at that time a considerable balance was due from the obligor to the firm. Advances were afterwards made by the bankers, and payments on account were made to them by the obligor, who was credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account. After the balance due at the time of the partner's death had been considerably reduced, that reduced balance was, by order of the obligor, transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor; and the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond. But it was held that, as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that, having received in different payments, a sum more than sufficient to discharge the debt due upon the bond at the

however, many exceptions to the rule, referable to the peculiar circumstances or the equities of each case. See *Logan v. Mason*, 6 Watts & S. 9; *Capen v. Alden*, 5 Met. 272; *Upham v. Lafavour*, 11 Met. 174. If an agent, having blended a demand due to his principal with one due to himself, receives a general remittance from the debtor, it shall be applied towards the discharge of both debts in proportion. *Barrett v. Winslow*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325; *Scott v. Ray*, 18 Pick. 361. See also *Pothier*, par Dupin, tom. 1, pt. 3, c. 1, art. 7, reg. 4; 1 *Evans's Pothier*, 374; *Perris v. Roberts*, 1 Vern. 34; S. C. 2 Ch. Ca. 84. The mere fact, that a payment was made to a creditor having demands upon the same debtor, with the debtor's money, through one who was the security of the debtor, for one of the debts, is not a circumstance from which an inference can arise, that the debtor intended it should be applied to the debt of which such agent was the guarantor. *Mitchell v. Dall*, 4 Gill & J. 361. If several notes are joined in one suit, and the execution recovered in such suit is satisfied only in part, a surety on some of the notes may insist on a proportional application of the money. *Blackstone Bank v. Hill*, 10 Pick. 129. See further, on the subject of appropriation of payments, *Postmaster General v. Furber*, 4 Mason, 336; *Seymour v. Van Slyck*, 8 Wend. 403; *Webb v. Dickinson*, 11 Wend. 63; *Bank of N. Am. v. Meredith*, 2 Wash. C. C. 47; *Mason v. Marsh*, 2 Caines, 99; *Bacon v. Brown*, 1 Bibb, 334; *Smith v. Screven*, 1 McCord, 368; *Gwinn v. Whitaker*, 1 Harr. & J. 754; *Hilton v. Burleigh*, 3 N. H. 196; 1 *Evans's Pothier*, 268 *et seq.*; *Cole v. Trull*, 9 Pick. 325; *Postmaster v. Norvell*, Gilpin, 125; *Dedham Bank v. Chickering*, 4 Pick. 314; 9 Cowen, 773, 777; *Fairchild v. Holly*, 10 Conn. 175; 2 Dowl. Prac. Cas. 477; 2 Deac. & Chit. 534; 1 Al. & Nap. 196.]

time of the death of the deceased partner, the bond was to be considered as paid. (*p*)

But a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary this rule. And accordingly, if it should appear that a bond was given to secure the plaintiffs against advances which they might *from time to time* make to the defendant, the rule would not apply; because that would show that the amount of the bond was not to be brought into account, like any other item. (*q*)

So, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, who joins the transactions with the old and new firms in one entire account, the rule appears to be, that the payments made from time to time by the surviving partners must be applied to the old debt; because it is to be presumed, that all the parties have consented that it should be considered as one entire account, (*r*) and that the death of one of the partners has produced no alteration. (*s*)

7. A receipt or other acknowledgment, not under seal, (*t*) is not conclusive, but only *primâ facie* evidence, that the money therein mentioned has been paid. And the effect of such receipt may be destroyed, by proof that it was obtained by fraud, or under a mistake of facts; (*u*) or

Receipt for money not conclusive, if not under seal.

(*p*) *Bodenham v. Purchas*, 2 B. & Ald. 39; *Williams v. Rawlinson*, 3 Bing. 71. [See Collyer Partn. §§ 633–635.] Holroyd J. in *Bodenham v. Purchas*, seemed to be of opinion, that the transfer of the balance due from the obligor to the account of the other customer, with his assent, operated in point of law as a payment.

(*q*) Per Cur. *Henniker v. Wigg*, 4 Q. B. 792, 794.

(*r*) See *Moor v. Hill*, Peake Add. Ca. 10.

(*s*) *Simson v. Ingham*, 2 B. & C. 72. Retiring partner when not discharged by the creditor taking the bill of the remaining partners; *David v. Ellice*, 5 B. & C. 196; and see *Kirwan v. Kirwan*, 2 C. & M. 617; *Thompson v. Percival*, 5 B. & Ad. 925.

(*t*) *Gilb. Ev.* 142.

(*u*) *Farrar v. Hutchinson*, 9 A. & E. 641; *Stratton v. Rastall*, 2 T. R. 366; *Fortesc.* 157; *Alner v. George*, 1 Camp. 393, 394, note; *Lampon v. Cork*, 5 B. & Ald. 611; *Skaife v. Jackson*, 3 B. & C. 421. [If a receipt in discharge of a right has been executed voluntarily and with a proper understanding, and there is no proof of fraud, mistake, or ignorance of the rights of the party executing it, the presumption in favor of its validity must prevail. *Caldwell v. Gilles*, 2 Porter, 526. According to the decisions in Connecticut, a receipt in full is a discharge, unless it is executed under circumstances of mistake, accident, or surprise, or is founded in fraud. *Bonnell v. Chamberlin*, 26 Conn. 487; *Fuller v. Crittenden*, 9 Conn. 401; *Tucker v. Baldwin*, 13 Conn. 136; *Hurd v. Blackman*, 19 Conn. 177.]

that it formed part of a transaction which was merely colorable, no money having, in fact, been paid. (x)

So a receipt may be explained by parol evidence. (y)

(x) *Bowes v. Foster*, 2 H. & N. 779.

(y) *Graves v. Key*, 3 B. & Ad. 313; [*Bell v. Bell*, 12 Penn. St. 235; *Kirkpatrick v. Smith*, 10 Humph. 188; *Gibson v. Hanna*, 12 Missou. 162; *Bartlett v. Mayo*, 33 Maine, 518; *White v. Parker*, 8 Barb. 48; *Houston v. Shindler*, 11 Barb. 36; *Stackpole v. Arnold*, 11 Mass. 27, 32; *Peddicord v. Hill*, 4 Monroe, 373; *Harden v. Gordon*, 2 Mason, 561; *Trisler v. Williamson*, 4 Harr. & M'Hen. 219; *Burnap v. Patridge*, 3 Vt. 144; *Putnam v. Lewis*, 8 John. 389; *Johnson v. Weed*, 9 John. 310; *Slaughter v. Hamm*, 2 Ham. 271, 275; *Caldwells v. Harlan*, 3 Monroe, 349, 350; *Davis v. Hall*, 4 Monroe, 27; *Williams v. Cummings*, 6 Monroe, 157; *Sparhawk v. Buell*, 9 Vt. 41; *Monell v. Lawrence*, 12 John. 521; *Brooks v. White*, 2 Met. 283; *Weed v. Snow*, 3 McLean, 265. But the natural presumption is in favor of a receipt, and that presumption will prevail, till it is displaced by direct proof or strong circumstances. And in case of doubtful claims, when a compromise takes place and receipts are given as final discharges between the parties, upon deliberate consideration and good faith, there is the greatest reason to uphold them. But when there has been no such compromise; when there has been an entire mistake of right, or unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice, in refusing the injured party an equitable relief. Per Tenney J. in *Cunningham v. Batchelder*, 32 Maine, 318; *Harnden v. Gordon*, 2 Mason, 541. The purpose for which a receipt was given may be shown by extrinsic evidence; and that purpose being ascertained, it cannot be used for a different purpose. *Bishop v. Perkins*, 19 Conn. 300; *Walrath v. Norton*, 5 Gilman, 437; *Smith v. Ballou*, 1 R. I. 496. And this is true, although the purpose shown by the parol evidence is not in accordance with the obvious import of the provisions of the

written receipt. The statement of a party to a receipt of what was the "true intent and meaning of the receipt," as understood by him "at the time" of executing it, is, in explanation of it, competent evidence, as tending to show the real intention and purpose of the parties in the transaction. *Furbush v. Goodwin*, 25 N. H. 425; *Woodman v. Eastman*, 10 N. H. 357. Where a receipt acknowledges a payment in money, it may be shown by parol that the payment was not in money. *Battle v. Rochester City Bank*, 3 Comst. 88. The clause in a deed, acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer, is open to explanation by parol proof. Thus, where the consideration in a deed conveying lands was expressed to be *money paid*, it was held, that parol evidence was admissible to show that the consideration, instead of money, was *iron* of a specified quantity, valued at a stipulated price. *M'Crea v. Purmort*, 16 Wend. 460. So the grantor in a deed may show, in a declaration founded on the indebtedness arising from the sale of land, that payment was made by the grantee's note, which is lost. *Lazell v. Lazell*, 12 Vt. 443. *It seems*, according to the *American cases*, that the only effect of a *consideration clause* in a deed, is to estop the grantor from alleging that the deed was executed *without consideration*; and that for every other purpose it is open to explanation, and may be varied by *parol proof*. *M'Crea v. Purmort*, 16 Wend. 460; *Taggart v. Stanbery*, 2 McLean, 543; *Wilkinson v. Scott*, 17 Mass. 249; *Bowen v. Bell*, 20 John. 338; *Morse v. Shattuck*, 4 N. H. 229; *Pritchard v. Brown*, 4 N. H. 397; *Buffum v. Green*, 5 N. H. 71; *Scoby v. Blanchard*, 3 N. H. 170; *Belden v. Seymour*, 8 Conn. 304; *Schillinger v. McCann*, 6 Greenl. 364; *Oneale v. Lodge*, 3 Har. & M'Hen. 433; *Hamilton v. M'Guire*, 3 Serg. & R. 355; *Weigley v. Weir*, 7 Serg. & R. 309; *Shepherd v. Little*, 14 John. 210; *Hutchinson*

The stat. 33 & 34 Vict. c. 97, (z) imposes (from and after the 1st January, 1871) upon every receipt given for or upon the payment of money, amounting to 2*l.* or upwards, a duty of *one penny*.

But receipts given for money deposited in any bank, or with any banker, to be accounted for, and expressed to be received of the person to whom the same is to be accounted for, are exempt from stamp duty. (a)

Acknowledgments of the receipt of money, entered at different times on unstamped paper, are not admissible as evidence of the payments made; but it has been held, that an account of debts and credits, *bond fide* made out at one time, in order to be delivered to the defendant as showing the balance against him, may be given in evidence by the defendant to prove the payments, without a receipt stamp. (b) And so it has been held, that a written acknowledgment at the foot of an account, that it is correct, does not require a receipt stamp. (c)

But an unstamped receipt, in the handwriting of a witness, though not *per se* admissible in evidence, may be shown to such witness, in order to refresh his memory as to the fact of the payment having been made in his presence. (d) And if he swears that he has no doubt, from the circumstance of his having made the memorandum, that the money was paid as stated therein, that will suffice, although he may add that he cannot recollect the fact. (e)

So, a written acknowledgment of the payment of money, which is stamped as a receipt, may be given in evidence to prove the fact of payment, although there be other writing on the same paper which amounts to an agreement.

v. Sinclair, 7 Monroe, 291, 293; *Gully v. Grubbs*, 1 J. J. Marsh. 388-390; *Higdon v. Thomas*, 1 H. & Gill, 139, 145; *Watson v. Blane*, 12 Serg. & R. 131, 137; *Curry v. Syles*, 2 Ill. 404; *Steele v. Worthington*, 2 Ham. 182, 187; *Swisher v. Swisher*, Wright, 755, 756; *Harvey v. Alexander*, 1 Rand. 219; *Lingan v. Henderson*, 1 Bland, 249; 2 Sugden V. & P. (8th Am. ed.) 645, and cases in note (b). But see *Steele v. Adams*, 1 Greenl. 1; *Emery v. Chase*, 5 Greenl. 232; *Dixon v. Swiggett*, 1 Har. & John. 252; *Brocket v. Foscue*, 1 Ruffin, 54; S. C. 1 Hawks, 64; *Spiers v. Clay*, 4 Hawks, 22; *Graves v. Carter*, 2 Hawks, 576; *Griswold v. Messenger*, 6 Pick. 517.]

(z) Sched. Receipt. As to what is a receipt within the act, see s. 120. As to the terms on which a receipt given without being stamped, may afterwards be stamped, see s. 122.

(a) 33 & 34 Vict. c. 97, sched. Receipt.

(b) *Wright v. Shawcross*, 2 B. & Ald. 501, 502, note.

(c) *Wellard v. Moss*, 1 Bing. 134.

(d) *Bainbert v. Cohen*, 4 Esp. 213; *Jacob v. Lindsay*, 1 East, 460.

(e) *Morgan v. Hubbard*, 8 B. & C. 14.

provided this does not in any manner control or qualify such acknowledgment. (*f*)

And, on the other hand, a memorandum containing an acknowledgment of the receipt of money, but which is not stamped as a receipt, may be put in evidence, if it be not offered as proof of the receipt of money, but for other purposes. (*g*) Thus, where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance; if the object of the parties be, not to prove the fact of that balance having been paid; but merely to show an acknowledgment by them, that the state of the account was such and such at a particular moment; the paper may be used for this purpose, without a stamp, whether the money has been paid or not. (*h*) And so it was held, that a bill of parcels delivered by the plaintiff, at the foot of which there was a receipt written at the same time with the bill, was admissible without a receipt stamp, for the purpose of proving that the goods mentioned were sold to a third person, and not to the defendant. (*i*)

Admissible
for collateral
purpose.

And it seems, that where an instrument in the form of a receipt, is put in evidence for the purpose of proving money lent, it need not be stamped as a receipt, if it appear that it was not given at the time the money was lent. (*k*)

But if the matter to be proved is the payment of money, and such payment is to be proved by the production of a receipt, the stamp acts apply to such documents, so produced, — whether it be for the direct purpose of proving payment as a discharge between debtor and creditor, or for an indirect and collateral purpose, as to show some right in or advantage belonging to a party, in consequence of such payment. (*l*)

The 33 and 34 Vict. c. 97, s. 123, enacts, that if any person

(*f*) *Grey v. Smith*, 1 Camp. 387; *Skirne v. Elmore*, 2 Ib. 407. And see *Ody v. Cookney*, 1 Moo. & Rob. 517. A receipt noticing the terms or consideration of a payment, does not require an agreement stamp. *Watkins v. Hewlett*, 3 Moore, 211. A receipt for the price of a horse sold, "warranted sound," may be read in evidence as proof of the warranty, without an agreement stamp. *Skirne v. Elmore*, 2 Camp. 407.

fully considered, *Matheson v. Ross*, 2 H. L. Cas. 286, 300, 301; *Evans v. Protheroe*, 20 L. J. C. 448. See, also, *Brookes v. Davies*, 2 C. & P. 186.

(*h*) Per Cottenham C. *Matheson v. Ross*, 2 H. L. Cas. 286, 300, 301.

(*i*) *Millen v. Dent*, 10 Q. B. 846.

(*k*) See per Pollock C. B. and Parke *B. Taylor v. Steele*, 16 M. & W. 665, 667, 668.

(*l*) Per Cottenham C. *Matheson v. Ross*, 2 H. L. Cas. 286, 300, 301.

(*g*) See the rule on this subject very

(1) gives any receipt liable to duty, not duly stamped; (2) in any case where a receipt would be liable to duty, refuses to give a receipt duly stamped; (3) upon a payment to the amount of 2*l.* or upwards, gives a receipt for a sum not amounting to 2*l.*, or separates or divides the amount paid, with intent to evade duty, he shall forfeit the sum of 10*l.*

And, upon the 43 Geo. 3, c. 126, s. 5, — which corresponded with clause (2) of the above enactment, — it was held, that the debtor should not tender the money conditionally, that is, if the creditor will give a receipt; but that he should tender the money absolutely, or pay it before a witness, and then require the creditor to write a receipt upon stamped paper, with which the debtor should at the time be provided. (*m*)

3. *Accord and Satisfaction.*

1. The general rule is, that *accord without satisfaction is no bar*; and it is laid down in most of the earlier authorities, that an accord, to be of any avail, must be fully and actually executed and accepted. (*n*) But this latter proposition requires some explanation. (*n*¹)

Thus it is laid down in Comyn's Digest, (*o*) that "an accord *with mutual promises to perform* is good, though the thing *be not performed* at the time of action; for the party has a *remedy* to compel the performance." (*o*¹).

(*m*) See *Laing v. Meader*, 1 C. & P. 257. But see *Richardson v. Jackson*, 8 M. & W. 298.

(*n*) Bac. Abr. Accord (A.), Com. Dig. Accord (B.); *Allen v. Harris*, 1 Ld. Raym. 122; S. C. Lut. 1538; *Lynn v. Bruce*, 2 H. Bl. 317; *Drake v. Mitchell*, 3 East, 251. In *Bayley v. Homan*, 3 Bing. (N. C.) 915, 920; *Allies v. Probyn*, 2 Cr. M. & R. 408; *Edwards v. Chapman*, 1 M. & W. 231; *Reeves v. Hearne*, Ib. 326; *Collingbourne v. Mantell*, 5 M. & W. 292; and *James v. David*, 5 T. R. 141; this general rule was admitted. [See, also, *Frentress v. Markle*, 2 Greene (Iowa), 553; *Woodruff v. Dobbins*, 7 Blackf. 582; *Ballard v. Nooks*, 2 Pike, 45; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Frost v. Johnson*, 8 Ham. (Ohio) 393; *Watkinson v. Inglesby*, 5 John. 386; *Coit v. Houston*, 3 John. Cas. 243; *Anderson*

v. Highland Turnp. Co. 16 John. 86; *Ellis v. Bitzer*, 2 Ham. 91; *Williams v. Stanton*, 1 Root, 426; *Bullen v. M'Gillicuddy*, 2 Dana, 92; *Spruneburger v. Dentler*, 4 Watts, 126.]

(*n*¹) [See *Fellows v. Stevens*, 24 Wend. 294.]

(*o*) Accord (B.), 4; cited by Peake J. in *Good v. Cheeseman*, 2 B. & Ad. 335; and per Cur. *Cartwright v. Cooke*, 3 B. & Ad. 702. See the observations of Grose J. in *James v. David*, 5 T. R. 143; and of Eyre C. J. in *Lynn v. Bruce*, 2 H. Bl. 318, who said that an accord *executory* is no bar, because no remedy lies for it for the plaintiff. But it is evident that the chief justice alluded to cases of bare promises to render satisfaction, not founded on a new consideration and binding on the creditor.

(*o*¹) [*Woodward v. Miles*, 24 N. H. 289;

But still it must appear, in such a case, that the accord was *accepted* in satisfaction. (*p*)

So where the accord is to do a thing in satisfaction at a future day, and the act is accordingly done and accepted at that day, and is in law a sufficient satisfaction; there is no right to sue on the original demand, after the day on which the satisfaction was rendered, although, at the time of the accord, the satisfaction was executory. (*q*)

On the other hand, if the accord or agreement that satisfaction should be rendered by the defendant, or a third person, at a future day, be not founded on a new consideration; and be not so far binding on the debtor, as to afford a fresh right of action to the creditor for its non-performance; an action will lie on the original demand, even before the time prescribed for rendering satisfaction. (*r*)

Babcock v. Hawkins, 23 Vt. 561; *Billings v. Vanderbeck*, 23 Barb. 546; *Perkins v. Lockwood*, 100 Mass. 249. In *Goodrich v. Stanley*, 24 Conn. 613, 620, Storrs J. says: "The principle is laid down in *Com. Dig. Accord* (B. 4), on the authority of *Case v. Barber*, T. Raym. 450, S. C. T. Jones, 158, that an accord with mutual promises to perform is good, though they be not performed at the time of action; for the party has a remedy to compel the performance; but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement; the meaning of which is, that an acceptance, in satisfaction of a debt, of an accord or agreement, with mutual promises to perform, on which the party has a legal remedy for its non-performance, is a good satisfaction of such debt, although such promises are not performed. And this principle has been repeatedly and fully sanctioned by modern cases. *Good v. Cheeseman*, 2 B. & Ad. 323; 1 Smith's Lead. Cas. 150; *Evans v. Powis*, 1 Exch. 601. In order that such an accord should be a defence to the original debt, it is necessary, in the language of Parke B. in the case last cited, that the plaintiff should have agreed to accept the agreement itself, and not the performance of it, as a satisfaction for his debt, so that if it was

not performed, his only remedy would be by an action for the breach of it, and not a right to recur to the original debt. There must be a valid agreement, substituting a new cause of action in place of the old. It is not sufficient that there is a mere accord between the same parties, with mutual promises, but there must be a new agreement with a new consideration. Although this doctrine, well established in the English cases, appears to have been regarded with disfavor in some of the courts of this country, we do not perceive why, on principle, an acceptance of a new and valid promise, which can be enforced in substitution of an existing claim, should not be held to be as effectual a satisfaction and extinguishment of such claim as the acceptance of any other thing." See *Bigelow v. Baldwin*, 1 Gray, 245.]

(*p*) *Flockton v. Hall*, 14 Q. B. 380; *Hall v. Flockton* (in error), 16 Q. B. 1039.

(*q*) 1 Roll. Abr. Accord, 129, pl. 14; *Com. Dig. Accord* (B.), 4.

(*r*) *Case v. Barber*, T. Raym. 450; S. C. Sir T. Jones, 158; 1 Roll. Abr. Accord, 129, pl. 12; *Wickham v. Taylor*, Sir T. Jones, 168. See *Peytoe's case*, 9 Co. 79 b; *Brown v. Wade*, 2 Keble, 851; [*Goodrich v. Stanley*, 24 Conn. 613. But a

And, upon the whole, the true distinction would seem to be, between cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; the rule being that, in the latter case, there shall be no satisfaction without performance; (*s*) whilst in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand. (*t*) Thus, where A. and B.,

The promise of one party may be accepted in satisfaction.

parol agreement entered into at the time of the execution of a written contract, if executed afterwards by way of satisfaction, is a bar. In an action on a promissory note, the defendant pleaded, that after the execution of the note, and before the commencement of the suit, he performed certain services for the plaintiff, in satisfaction of the debt, and that the plaintiff accepted such services in full satisfaction. On trial of the issue, after a traverse of the plea, the defendant offered evidence to prove that before, and at the time of the execution of the note, it was agreed between the parties that such services should be performed and accepted, to the amount of the sum due on the note, and in full satisfaction thereof; held, that such evidence was admissible. *Bliun v. Chester*, 5 Day, 359.]

(*s*) 1 Smith L. C. 150; *Gabriel v. Dresser*, 15 C. B. 622; *Flockton v. Hall*, 14 Q. B. 380; *Hall v. Flockton*, 16 Q. B. 1939; *Carter v. Wilmald*, 1 Exch. 81; *Reeves v. Hearne*, 1 M. & W. 326.

(*t*) Per *Cur. Evans v. Powis*, 1 Exch. 601, 607; and see *Henderson v. Stobart*, 5 Exch. 99; *Sard v. Rhodes*, 1 M. & W. 153; *Flockton v. Hall*, 14 Q. B. 380; *Case v. Barber*, and *Good v. Cheeseman*, 2 B. & Ad. 328, 335. [In *Babcock v. Hawkins*, 23 Vt. 561, it was decided, that an agreement upon sufficient consideration, fully executed, so as to have operated, in the minds of the parties, as a full settlement and satisfaction of a preëxisting contract, or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not; and the

party is bound to sue upon the new contract, if such were the agreement of the parties. There is no want of consideration in any such case, where one contract is substituted for another; and especially so, where the amount due upon the former contract or account is matter of dispute. *Babcock v. Hawkins*, *supra*. The accord is sufficiently executed, when all is done which the party agrees to accept in satisfaction of the preëxisting obligation; and this is ordinarily matter of intention, and may be evidenced by surrender of the former securities, by release, by receipt in full, or in any other mode showing such a purpose. *Babcock v. Hawkins*, *supra*. In every case, where one security, or contract, is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. *Babcock v. Hawkins*, *supra*. See *Abbott v. Wilmot*, 22 Vt. 437; *Jenness v. Lane*, 26 Maine, 475. So, in *Woodward v. Miles*, 24 N. H. 289, it was held that an agreement to make a new contract, and that the new contract shall be accepted in satisfaction of the original one, if carried into effect, is an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not. *Watkinson v. Ingleby*, 5 John. 386; *Eaton v. Lincoln*, 13 Mass. 424; *Seaman v. Haskins*, 2 John. Cas. 195; *Heaton v. Angier*, 7 N. H. 397; *Goodrich v. Stanley*, 24 Conn. 613; *Bigelow v. Baldwin*, 1 Gray, 245. If the promise of a third party to pay the creditor in goods is accepted in satisfaction, that is a

brothers, were principal and surety in an annuity bond; and by an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be B.'s, the surety's debt; it was held, that this agreement, whether subsequently acted upon or not, was a binding accord between A. and B.; and that, B.'s administrator having been obliged to pay arrears of the annuity, he could not recover them from A. (u)

So a new agreement to render satisfaction, founded on a good consideration and mutually binding, whereby a doubtful cause of action for unliquidated damages is not perpetually barred, but is merely suspended for a fixed period, that is, until the claimant has done a particular act, will be a good defence to an action brought before the prescribed period on the original cause of action. (u¹) Thus, in *Stracey v. The Bank of England*, (x) it appeared that certain stock of the plaintiffs having been transferred under a forged power of attorney, the bank offered to replace the stock, if the plaintiffs would first prove the amount, under a commission of bankruptcy issued against a firm in which the forger of the power had been a partner; and that, after this offer, the plaintiffs received a dividend and engaged to tender a proof of their demand under a commission of bankruptcy. And it was held, that they could not sue the bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy.

New agreement to render satisfaction.

So in an action on the case, for wrongfully causing a *capias ad satisfaciendum* to be indorsed to levy more than was claimable

good defence to the action of the creditor. *Runlett v. Moore*, 21 N. H. 336. But upon a verbal agreement between A., B., and C., that a note due from B. to A. shall be paid by C. at a future day, the promise of C. to pay accordingly, is to be regarded as executory, and does not of itself operate as a payment of the note. *Weeks v. Elliott*, 33 Maine, 488. If, upon such an agreement, the promise of C. be, that he will make the payment in services (the promise being entire), it cannot be claimed, as against the holder, that any part of the

note is paid by the performance of only a part of the services. *Weeks v. Elliott*, *supra*.]

(u) *Cartwright v. Cooke*, 3 B. & Ad. 701.

(u¹) [Where A. and B. have suits against each other for false imprisonment pending, a mutual agreement to discontinue the suits, and an actual discontinuance accordingly, are good as an accord and satisfaction. *Foster v. Trull*, 12 John. 456. See *Vedder v. Vedder*, 1 Denio, 257.]

(x) 6 Bing. 754.

thereon, it appeared that the defendant was discharged out of custody upon the writ, by virtue of a judge's order, upon certain terms which constituted a new and mutual agreement between the parties, and which were embodied in the order. And Parke J. said: "In considering the terms of this order, I am inclined to think that there is evidence of a mutual agreement between the parties, upon good consideration, to forego the action for charging the plaintiff in execution for too much; and an agreement giving the plaintiff a remedy for the breach of it, or an accord executed, — where there was no remedy by action upon the accord itself, — is a bar to an action for unliquidated damages." (y)

But the assignment of property by deed, for the purpose of securing debts due, and to be due, with a power of sale on giving six months' notice, is to be viewed only as a *collateral security*, and does not suspend the remedy by action for the debts, although no such notice has been given; unless there be an express stipulation in the deed, that the remedy by action should not be adopted. (z)

The effect of taking a bill of exchange or promissory note, on account of a debt, will be considered hereafter.

There cannot be an accord and satisfaction by delivery merely; for it must appear that the thing delivered was not only given to, but was also accepted by, the plaintiff in satisfaction. (a) But there may be an acceptance in satis-

(y) *Wentworth v. Bullen*, 9 B. & C. 840, 850.

(z) *Emes v. Widdowson*, 4 C. & P. 151. [See *Stone v. Miller*, 16 Penn. St. 450; *Jones v. Fennimore*, 1 Greene (Iowa), 134.]

(a) *Stead v. Poyer*, 1 C. B. 782; [*Maze v. Miller*, 1 Wash. C. C. 328; *State Bank v. Littlejohn*, 1 Dev. & Batt. 565;] *Hardman v. Bellhouse*, 9 M. & W. 596, 600. And as to what is an acceptance in satisfaction, see the latter case. [Whether there has been an acceptance or not, is a question for the jury. *Hardman v. Bellhouse*, 9 M. & W. 600; *Brenner v. Herr*, 8 Penn. St. 106; *Stone v. Miller*, 16 Penn. St. 450. "Whether an accord with a *tender of satisfaction*, is sufficient, without acceptance, is a point upon which the authorities are not agreed. It is, however," Mr. Greenleaf says, "perfectly clear that a

mere agreement to accept a less sum in composition of a debt is not binding, and cannot be set up in bar of an action upon the original contract." 2 Greenl. Ev. § 31. As, where a creditor agreed to receive of his debtor a certain proportion of his debt in full satisfaction of the whole, and the sum agreed to be paid was tendered and refused, this was held to constitute no bar to an action for the whole debt. So, where the agreement was to receive part of a debt in money, and the residue in specific articles, no tender of the latter being averred, this is no bar to an action for the original demand. 2 Greenl. Ev. § 31; *Heathcote v. Crookshanks*, 2 T. R. 24; *Tassall v. Shane*, Cro. El. 193; *Clark v. Dinsmore*, 5 N. H. 136; *Lynn v. Bruce*, 2 H. Bl. 317. "But whether, when the agreement is for the performance of some collateral act, and is upon sufficient con-

faction without delivery. And, accordingly where, to an action of debt for use and occupation, the defendant pleaded, that the plaintiff seized the defendant's goods as a distress; that they were of sufficient value to satisfy the rent and costs; and that the plaintiff never sold the goods, but, with the assent of the defendant, retained them in satisfaction of the rent; this was held to be a good bar. (*b*)

It is laid down in the older authorities, that the satisfaction should, in contemplation of law, be *advantageous* to the party agreeing to receive it; and that it will be inoperative, if it appear that it could not possibly afford him any benefit or compensation. (*c*) And the rule to which we have already adverted, namely, that the payment and receipt of part of a debt is in general no satisfaction of the remainder, would appear to be founded on this principle. (*d*)

Rule as to satisfaction being advantageous.

But we have seen that this rule does not apply to cases where a smaller sum is paid in satisfaction of a larger, the latter being

sideration, a tender of performance is equivalent to a satisfaction, seems still to be an open question; though," Mr. Greenleaf says, "the weight of authority is in the affirmative." 2 Greenl. Ev. § 31; Coit v. Houston, 3 John. Cas. 249; Cartwright v. Cook, 3 B. & Ad. 701; Bradley v. Gregory, 2 Camp. 383; Heirn v. Carron, 11 Sm. & M. 361; 10 Law Rep. (Boston) 337. But see Russell v. Lyttle, 6 Wend. 391; Hawley v. Foote, 19 Wend. 516. In Hawley v. Foote, *supra*, a plea that the plaintiff accepted an order of the defendant on a third person for a given sum, in satisfaction of the promises, was held no bar to an action for the original cause of indebtedness. So, also, a plea was held bad, as an accord and satisfaction, that the plaintiff agreed to accept the note of a third person, which on being tendered, he refused to accept. Day v. Roth, 4 Smith (N. Y.), 448.]

(*b*) Jones v. Sawkins, 5 C. B. 142, 153.

(*c*) Bac. Abr. Accord (A.); Com. Dig. Accord (B. 1).

(*d*) *Ante*, 1101; and see Fitch v. Sutton, 5 East, 230; Mitchell v. Cragg, 10 M. & W. 367. [An agreement to accept a part

of a debt as a satisfaction of the whole, is without consideration; and the payment of a part only, in pursuance of such agreement, is no satisfaction. Warren v. Skinner, 20 Conn. 559; Hardey v. Coe, 5 Gill, 189; Daniels v. Hatch, 1 N. Jer. 391; Bailey v. Day, 26 Maine, 88; White v. Jordan, 27 Maine, 370; Eve v. Moseley, 2 Strobh. 203; Miller v. Holden, 18 Vt. 337; Fellows v. Stevens, 24 Wend. 294; Vance v. Lukenbill, 9 B. Mon. 249; Smith v. Bartholomew, 1 Met. 276; Hinckley v. Arey, 27 Maine, 362; Ryan v. Ward, 48 N. Y. 204; Clifton v. Litchfield, 106 Mass. 34. The cases where such agreement and payment constitute such accord and satisfaction are where the agreement is not a mere *nudum pactum*, but rests on a new and adequate consideration. Warren v. Skinner, 20 Conn. 559. The rule of the common law on this subject has been altered by statute in Maine. Austin v. Smith, 39 Maine, 203; Weymouth v. Babcock, 42 Maine, 42. How far payment and acceptance of the principal sum of a demand in full or in satisfaction, is an answer to a claim for interest on the same sum, see Johnston v. Brannon, 5 John. 271; Tuttle v. Tuttle, 12 Met. 551.]

claimed as unliquidated damages. (e) And it has been decided, that the gift of a thing of uncertain value, may be a satisfaction of any sum due on a simple contract. (e¹) Thus, a negotiable security may operate in satisfaction of a debt of greater amount, if it be so given and accepted. (f) So where, to an action of debt for goods sold and delivered, the defendant pleaded an agreement, whereby the plaintiff was to take a bill of exchange accepted by one M., but with a blank space for the name of the drawer; and that, if the bill was not paid at maturity, the defendant was to become liable to the plaintiff to the extent of 10*l.*; but if it should be paid, then the defendant was to be discharged from the whole de-

Cases in which a thing may be given, in satisfaction of a claim of greater value.

(e) *Ante*, 1102; [Donohue v. Woodbury, 6 Cush. 148, 150, 151; McDaniels v. Lapham, 21 Vt. 222; Stockton v. Frey, 4 Gill, 406; Hiern v. Carren, 11 Sm. & M. 361. Where the plaintiff receives a certain sum and gives his receipt in full for a claim disputed in good faith by the defendant, though for double the amount, this is a good accord and satisfaction. Palmerton v. Huxton, 4 Denio, 166. See Tuttle v. Tuttle, 12 Met. 551, 554; Taylor v. Nussbaum, 2 Duer (N. Y.), 302; Cooper v. Parker, 15 C. B. 822; S. C. 14 C. B. 118.]

(e¹) [Douglass v. White, 3 Barb. Ch. 621; Watkinson v. Inglesby, 5 John. 386; Eaton v. Lincoln, 13 Mass. 424; Dewey J. in Brooks v. White, 2 Met. 285, 286.]

(f) Sibre v. Tripp, 15 M. & W. 23; [Conkling v. King, 10 Barb. 372; Sanders v. Branch Bank of Decatur, 13 Ala. 353. If a debtor give his note indorsed by a third person as further security for a part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and it may be pleaded in bar as an accord and satisfaction. Boyd v. Hitchcock, 20 John. 76; Brooks v. White, 2 Met. 233; 4 Chand. Law Rep. 30; Sanders v. Branch Bank of Decatur, 13 Ala. 353; Lee v. Oppenheimer, 32 Maine, 353. The additional security required by the creditor for a part of his debt, is a good

consideration for the relinquishment of the residue. Le Page v. M'Crea, 1 Wend. 172; Kearslake v. Morgan, 5 T. R. 513. This doctrine is admitted in Hughes v. Wheeler, 8 Cowen, 79, and the distinction is there adverted to between the note of a third person, and that of the debtor himself given for the original debt. As to the propriety and correctness of this distinction, see Sibre v. Tripp, 15 M. & W. 23; Thomas v. Heathorn, 2 B. & C. 477; Webb v. Goldsmith, 2 Duer (N. Y.), 413. So, the acceptance in full satisfaction by a creditor of the note of a third person, indorsed by his debtor for the whole amount due on a previous note given by the debtor, may be pleaded as an accord and satisfaction to an action on the previous note. Booth v. Smith, 3 Wend. 68. Although the defendant still remains liable, the character of his responsibility is changed, and he cannot be charged upon the original consideration. *Ib.* So, it is a good accord and satisfaction, if the creditor receives a less sum than is his due, in satisfaction of the whole, before the day of payment. Brooks v. White, 2 Met. 283. See Kellogg v. Richards, 14 Wend. 116; Brown v. Stackpole, 9 N. H. 478. But where the third person, whose note is taken in satisfaction is an infant, and he has successfully defended on the ground of infancy, the agreement to receive it in satisfaction is without consideration and void. Wentworth v. Wentworth, 5 N. H. 410.]

mand : it was held, on special demurrer, that the defendant was entitled to judgment. (*g*) In like manner the payment by a defendant, of a smaller sum, with an agreement to abandon his defence and pay costs, may be pleaded in satisfaction of a demand for a larger sum, whether it be liquidated or not. (*h*) So, where there were several matters in difference between the plaintiff and the defendants, some of which were the subject of an action; and it was agreed between them, that, in consideration that the defendants would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him, in respect of the matters not the subject of the action : it was held, that this agreement and its performance were a good bar to an action in respect of such last-mentioned matters. (*i*) And upon the same principle it has been held, that the acceptance by a creditor, of the sole liability of one of two joint debtors, is a good consideration for an agreement by him to discharge the joint liability of both. (*k*)

Nor will the court, in such cases, inquire into the reasonableness of the satisfaction. (*l*)

2. But in an action for taking cattle, it is no plea that it was agreed that the plaintiff should have his cattle again, and that they were returned; for this is no satisfaction of the injury sustained from the detention. (*m*) So where, to an action for breach of a contract to deliver to the plaintiff certain promissory notes, the defendant pleaded that, after breach, the defendant delivered to the plaintiff, at his request, for and on ac-

What is not a sufficient satisfaction.

(*g*) *Curlewis v. Clark*, 3 Exch. 375; 18 L. J. Exch. 144.

(*h*) *Cooper v. Parker* (in Cam. Scac), 15 C. B. 822; S. C. in C. P. 14 C. B. 118.

(*i*) *Williams v. London Commercial Exchange Company* (in Cam. Scac.), 10 Exch. 569. [Where a party makes an offer of a certain sum to settle a claim, the sum in controversy being uncertain and unliquidated, and he attaches to his offer the condition that the sum offered, if taken at all, must be received in full satisfaction of the claim in dispute, the other party, if he receives it, takes it subject to the condition, and it will thus operate as an accord

and satisfaction, even though he declares at the time that he receives it only in part payment, or as far as it goes. *McDaniels v. Bank of Rutland*, 29 Vt. 230; *McDaniels v. Lapham*, 21 Vt. 222. See *Donohue v. Woodbury*, 6 Cush. 148.]

(*k*) *Lyth v. Ault*, 7 Exch. 669; 21 L. J. Exch. 217.

(*l*) *Sibree v. Tripp*, 15 M. & W. 23; *Curlewis v. Clark*, 3 Exch. 375; 18 L. J. Exch. 144.

(*m*) *Peytoe's case*, 9 Rep. 78 a; 1 Roll. Abr. 128, l. 35; [*Keeler v. Neal*, 2 Watts, 424; *Davis v. Noaks*, 3 J. J. Marsh. 497; *Logan v. Austin*, 1 Stewart, 476.]

count of the said notes, and of the promise and damages in respect thereof, an order in writing on B., in whose hands the notes were, to deliver them to the plaintiff; that the plaintiff received the order on account of the notes, and of the said promise and damages; that B. was always ready and willing to deliver the notes on the said order being presented to him; but that the plaintiff did not present the same within a reasonable time, but kept it for an unreasonable time, and until the notes were feloniously stolen from B.; this was held to be a bad plea of accord and satisfaction. (*n*) So where, to an action for money paid, the defendant pleaded that, before action brought, the defendant gave to the plaintiff, and the latter received from him authority to receive for the defendant and as his agent moneys then due to the defendant, exceeding the sum in the declaration mentioned, and to pay himself thereout in full satisfaction and discharge of the promises, &c.; and that the defendant, at the time of giving such authority, did, at the plaintiff's request, intrust him with the sole collection of the said moneys, on the terms—then assented to by the plaintiff and the defendant—that the plaintiff should use reasonable diligence in endeavoring to collect the same; and the plea then alleged, that the plaintiff might before action, have collected the said moneys to an amount sufficient to satisfy his claim; but that by his negligence, he had not done so, and that the chance of the same being collected, by or on behalf of the defendant, had thereby become desperate: it was held, that the plea showed no accord and satisfaction. (*o*) And so, an agreement, not under seal, that the parties should be quit of actions against each other, is not a sufficient satisfaction. (*p*)

So, it is no plea to debt on a bond given to a firm that, on the obligees dissolving partnership, and some of them quitting the firm, the claim was assigned or transferred to the account of the new firm. (*q*)

So, where J. C. was indebted to S., and R. C. was indebted to S., and also to J. C., and it was verbally agreed between the three, that S. should transfer the debt due to him from J. C. to the ac-

(*n*) Griffiths v. Owen, 13 M. & W. 58.

(*o*) Gifford v. Whitaker, 6 Q. B. 249.

(*p*) James v. David, 5 T. R. 141; Roll. Abr. Accord; Davis v. Ockham, Sty. 245; Dighton v. Whiting, Lut. 57; Com. Dig. Accord (B. 1). [See Abbott v. Wilmot, 22 Vt. 437.] But an agreement by defendant,

to destroy certain evidences or documents, may be a sufficient accord and satisfaction as to a tort committed. Lane v. Applegate, 1 Stark. 97.

(*q*) Parker v. Wise, 6 M. & S. 239. [See Pope v. Tunstall, 2 Pike, 209; Woolfolk v. M'Dowell, 9 Dana, 268.]

count of R. C.; and S., in pursuance of such agreement, delivered to R. C. an account, in which the latter was charged with the debt due from J. C. to S.; it was held, that J. C. was not thereby discharged, there being no satisfaction to S. (*r*)

So in debt on *bond* the defendant pleaded, that he *released* to the plaintiff all his equity of redemption of and in certain premises, in satisfaction of all bonds from the defendant to the plaintiff; and, on demurrer, the court was clearly of opinion that, this being a debt upon an obligation without any condition, satisfaction must be pleaded to have been *by deed*. (*s*)

And so where, to debt on *bond* conditioned for the payment of money, the defendant pleaded, 1st, that after the day of payment and before action, the obligee received certain bills of exchange not then due, on account of part of the sum due on the bond; and, 2dly, that after that day the plaintiff received certain moneys in satisfaction of the residue; these pleas were held ill. (*t*)

So accord and satisfaction cannot be pleaded to a deed before breach. (*u*) But it may be pleaded in answer to a claim for damages, which have accrued under the deed. (*x*) And so, if an award be made under a submission by deed, and an action be brought for a breach of the award; accord and satisfaction, by a parol agreement, may be pleaded in answer to such breach. (*y*)

So if it appear that the accord and satisfaction on which the defendant relies has, by his own act or default, become wholly inoperative and void, such accord and satisfaction will be thereby defeated. Thus where, to debt for money had and received, the defendant pleaded the giving and acceptance of an annuity deed in satisfaction of the plaintiff's claim; and the plaintiff replied, that no memorial of such deed had been enrolled pursuant to the statute; and that, he having brought a previous action against the defendant

Accord and satisfaction cannot be pleaded, if it has been rendered inoperative by act of defendant.

(*r*) Cuxon v. Chadley, 3 B. & C. 591.

(*s*) Preston v. Christmas, 2 Wils. 86. [But where a debtor procured a conveyance to his creditor from a third person, of all his title to land specified in the deed, in pursuance of an agreement by which the creditor was to accept and did accept the same as a payment in full, but it subsequently appeared, that the grantor had no title to any such land, it was held, that, in the absence of fraud on the part of the

debtor, the claim of the creditor upon him was discharged. Reed v. Bartlett, 19 Pick. 273.]

(*t*) Worthington v. Wigley, 3 Bing. N. C. 454; S. C. 3 Scott, 558.

(*u*) Mayor of Berwick v. Oswald, 1 E. & B. 295; Spence v. Healey, 8 Exch. 668; [Harper v. Hampton, 1 Harr. & J. 673; Smith v. Brown, 3 Hawks, 580.]

(*x*) See cases cited, 1 E. & B. 303.

(*y*) Smith v. Trowsdale, 3 E. & B. 83.

for arrears of the annuity, the defendant had pleaded such want of enrolment; it was held to be a good answer to the plea of accord and satisfaction. (z) And so, if a bill of sale of goods be taken in satisfaction of a bond debt; and it be afterwards discovered that the bill of sale is void, in consequence of the debtor having previously committed an act of bankruptcy; the creditor may treat the bill of sale as a nullity, and it cannot be pleaded as an accord and satisfaction. (a)

To an action of assumpsit the defendant pleaded that the plaintiffs, in Easter term, 1827, impleaded him for the same causes of action, and that in Trinity term he pleaded the general issue to that action, and paid 5*l.* 15*s.* into court; that the plaintiffs' costs were taxed at 8*l.* 5*s.* 6*d.*; and that they agreed with him to take the sum of 5*l.* 15*s.* out of court; that the defendant paid the 8*l.* 5*s.* 6*d.* costs to the plaintiffs, and that they accepted and received the 5*l.* 15*s.*, together with those costs, in satisfaction and discharge of the promises mentioned in the declaration. The plaintiffs replied that they did not agree with the defendant to take and receive the 5*l.* 15*s.* out of court, and did not accept and receive the same, together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration. At the trial it appeared, that the plaintiffs had received the 8*l.* 5*s.* 6*d.*, the amount of their taxed costs, but that they suffered the 5*l.* 15*s.* to remain in court, and that the suit was terminated in another mode; and it was held, first, that the fact of the plaintiffs having received the amount of their costs, afforded no proof of their having accepted the 5*l.* 15*s.* together with those costs, in satisfaction of the promises in the declaration; and, secondly, that if, in point of law, it could have been so considered, the defendant ought to have pleaded that matter specially. (b)

3. Accord and satisfaction by one defendant is a bar for all. (c)

And so, where several plaintiffs sue for a joint demand, accord and satisfaction with one of them may be pleaded in bar of the action, without alleging any authority from the others to make the settlement in question. (d) [But the accord

With or by
one of sev-
eral parties.

(z) *Turner v. Browne*, 3 C. B. 157.

(a) *Hall v. Smallwood*, Peake Add. Ca. 13.

(b) *Power v. Butcher*, 10 B. & C. 329, 343, 348.

(c) Com. Dig. Accord (A. 1); *Hillary v. Ancles*, Skin. 391; [*Strange v. Holmes*, 7 Cowen, 224; *Ruble v. Turner*, 2 Hen. & Munf. 38; 2 Greenl. Ev. § 30.]

(d) *Wallace v. Kelsall*, 7 M. & W. 264;

and satisfaction must in either case be complete, entire, and fully executed. It will not avail if it be only a settlement with one of the plaintiffs, or one of the defendants for his share of the damages.] (*d*¹)

But satisfaction of a bill, as between a drawer or indorser, and an indorsee, whether made before or after the bill becomes due, does not inure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee; because the contracts created by the bill, as between the drawer and the acceptor, and the indorsee, are essentially distinct. (*e*)

4. There are some cases which seem to show, that an accord and satisfaction by a stranger is not a good bar. (*f*) But ^{By a stran-} the correct doctrine would appear to be, that satisfaction ^{ger.} made by a stranger to a party having a cause of action, and adopted by the party liable to the action, is a good bar to an action for such cause. (*g*) And so it would seem that, if the defendant and the party from whom the satisfaction proceeded, stood in the relation of principal and agent, such satisfaction would be a good bar for the defendant. (*i*)

So if a second policy be effected on the same vessel, in exactly the same sum, and upon the same terms, payment by one insurer will operate by way of satisfaction to the other. (*k*)

4. *That a Bill of Exchange, or other negotiable Security, has been taken for the Debt.*

It is a good plea to an action for the recovery of a simple contract debt, that the plaintiff has taken *from the debtor*, for and on account of the debt, a negotiable (*l*) bill or ^{Form of plea.}

Smith v. Lovell, 10 C. B. 6, 23. [See Homer v. Wood, 11 Cush. 62.]

(*d*¹) [Clark v. Dinsmore, 5 N. H. 136; Anderson v. Highland Turnp. Co. 16 John. 87; Rayne v. Orton, Cro. Eliz. 305.]

(*e*) Jones v. Broadhurst, 9 C. B. 173; Goodwin v. Cremer, 18 Q. B. 757.

(*f*) Edgecomb v. Rodd, 5 East, 294, 300, 301, decided on the authority of Grymes v. Blofield, Cro. El. 541. But *quære*, as to the accuracy of the report of this case in Croke? See 1 Roll. Abr. 471 f; [Daniels v. Hallenbeck, 19 Wend. 408.]

(*g*) Per Cur. Simpson v. Eggington, 10 Exch. 845, 847; Jones v. Broadhurst, 9 C. B. 173, 193; Belshaw v. Bush, 11 C. B. 191, 207; James v. Isaacs, 12 C. B. 791; Fitz. Abr. Barre, pl. 166; and see Co. Litt. 206 b; [Woolfolk v. M'Dowell, 9 Dana, 268; Booth v. Smith, 3 Wend. 66; Webster v. Wyser, 1 Stewart, 184.]

(*i*) Thurman v. Wild, 11 A. & E. 453, 460.

(*k*) Morgan v. Price, 4 Exch. 615, 620.

(*l*) James v. Williams, 13 M. & W. 828.

note for the amount, accepted, made, or indorsed by the debtor, and payable to the creditor himself, or to a third person. (*m*)

So it is a good plea by the debtor, that the plaintiff has accepted *from a third party*, a bill or note made, accepted, or indorsed by such third party, and delivered by him to the plaintiff for and on account of the debt. (*n*)

And where the bill or note is made payable to a third person, or is made by a third person, a plea which states the delivery by the defendant, and acceptance by the plaintiff of such bill or note, is a sufficient answer in the first instance. (*o*) But if the plea state no more than that a negotiable instrument was given for and on account of the debt, by which the defendant promised to pay to the plaintiff, or order, a sum of money; this will be no answer, unless it appear further, either that such instrument is still running, or that it has been indorsed over by the plaintiff. (*o*)

And this defence is not founded on the notion, that the bill or note operates as an absolute payment or extinguishment of the original debt, or that it changes its nature, or amounts to an accord and satisfaction; for the right to sue upon the original demand revives on the dishonor of the bill or note. (*p*) But where the creditor accepts a bill or note on account of his debt, it is held to be taken by him, as a qualified or conditional payment; (*q*) and accordingly, during the currency thereof, the original remedy is suspended or in abeyance. (*r*)

Thus, if a bill be *renewed*, no action can be maintained upon the original bill, whilst such renewed bill is running. (*s*)

(*m*) *Kearslake v. Morgan*, 5 T. R. 513; *Stedman v. Gooch*, 1 Esp. 3; *Rex v. Dawson*, Wightw. 32.

(*n*) *Belshaw v. Bush*, 11 C. B. 191.

(*o*) Per Cur. *Price v. Price*, 16 M. & W. 232, 241. *Semble*, overruling *Mercer v. Cheese*, 4 M. & G. 804. Where the bill was given to a third party *in trust for the plaintiff*, the same rules apply as where it was given to the plaintiff himself. See *National Savings Bank v. Tranah*, L. Rep. 2 C. P. 556.

(*p*) *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 T. R. 64. [Where, on the sale of goods, the purchaser, instead of giving his own note for the goods, transfers the note of a third person, and guar-

anties its payment, if the note be not paid when due, the vendor may recover on a count for goods sold. *Butler v. Haight*, 8 Wend. 535. And the note and guaranty may, in such case, be given in evidence under the money counts. *Butler v. Haight*, *supra*.]

(*q*) Per Cur. *Crowe v. Clay* (in Cam. Scac.), 9 Exch. 604, 608; per Pollock L. C. B. *Griffiths v. Owen*, 13 M. & W. 58, 64; per Alderson B. *James v. Williams*, 13 M. & W. 828, 833; per Cur. *Belshaw v. Bush*, 11 C. B. 191, 206.

(*r*) See *Sayer v. Wagstaff*, 5 Beav. 415; *Simon v. Lloyd*, 2 Cr., M. & R. 187.

(*s*) *Kendrick v. Lomax*, 2 C. & J. 405. [See *Gordon v. Price*, 10 Ired. 385.]

And where a renewed bill is taken and paid, the party is not justified in suing on the original bill, which was left in his hands, although costs incurred in taking a warrant of attorney, as an additional security, are left unpaid, contrary to agreement. (t)

But if there be an agreement to pay interest on the original bill, whilst the renewed bill is running, such interest may be recovered by action on the original bill, even after payment of the renewed bill. (u)

Again: where a debtor delivers a negotiable bill or note to his creditor, and the latter, at the time of receiving the same, agrees to take it in *payment* of the debt, and to take upon himself the risk of the bill or note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such an agreement is to be implied; the effect of it will be to destroy the right of action for the debt, and to leave the creditor without remedy, except upon the instrument. (x)

(t) *Dillon v. Rimmer*, 1 Bing. 100. In *Norris v. Aylett*, 2 Camp. 329, an action having been brought against the acceptor of a bill, it was agreed that he should *pay the costs* and give a new bill. The bill was given; but the costs were not paid; and Lord Ellenborough is reported to have decided that the plaintiff might sue *on the first bill*, although the second was outstanding in the hands of an indorsee, and might have execution on delivering up the substituted bill.

(u) *Lumley v. Hudson*, 5 Scott, 238.

(x) *Sayer v. Wagstaff*, 4 Beav. 415; *Sard v. Rhodes*, 1 M. & W. 153; *Brown v. Kewley*, 2 B. & P. 518. See *Ex parte Blackburn*, 10 Ves. 206; *Camidge v. Allenby*, 6 B. & C. 381, 382, 384; *Tempest v. Ord*, 1 Madd. 89. [In order that the giving of a bill or note for a preëxisting debt should be payment thereof, there must be either an express agreement to receive it in payment, or there must be circumstances from which an agreement may be inferred; and whether it was so given and received is a question for the jury. *Johnson v. Cleaves*, 15 N. H. 332; *Coburn v. Odell*, 30 N. H. 540, 557; *Bonnell v. Chamberlin*, 26 Conn. 487; *Lyman v. United States Bank*, 12

How. (U. S.) 225; *Vail v. Foster*, 4 Comst. 312; *Allen v. King*, 4 McLean, 128; *Steamboat Charlotte v. Hammond*, 9 Missou. 59; *Minis v. McDowell*, 4 Geo. 182; *Elwood v. Deifendorf*, 5 Barb. 398; *Van Steenburg v. Hoffman*, 15 Barb. 288; *Conro v. Port Henry Co.* 12 Ib. 27; *Peter v. Beverly*, 10 Peters, 567; *Sheehy v. Mandeville*, 6 Cranch, 253; *Wallace v. Agry*, 4 Mason, 342; *Bank of Troy v. Topping*, 9 Wend. 278, 279; *Burdick v. Green*, 15 John. 247; *Hughes v. Wheeler*, 8 Cowen, 77; *Booth v. Smith*, 3 Wend. 66; *New York State Bank v. Fletcher*, 5 Wend. 85; *Putnam v. Lewis*, 8 John. 389; *Johnson v. Weed*, 9 John. 310; *Bill v. Porter*, 9 Conn. 23; *Davidson v. Bridgeport*, 8 Conn. 472; *Elliott v. Sleeper*, 2 N. H. 525; *Cheever v. Mirick*, 2 N. H. 376; *Willie v. Green*, 2 N. H. 333; *Geiser v. Kersher*, 4 Gill & J. 305; *Glenn v. Smith*, 2 Gill & J. 493; *M'Evoy v. Baltimore*, 3 Harr. & J. 193; *Curtis v. Ingham*, 2 Vt. 290; *Hutchins v. Olcott*, 4 Vt. 555; *Prescott v. Hubbell*, 1 McCord, 94; *Barelli v. Brown*, 1 McCord, 449; *Kean v. Dufresne*, 3 Serg. & Rawle, 233. This is also the doctrine of the civil law. *Pothier on Oblig.* pt. 3, c. 2, art. 4; 1 *Domat*, b. 4, tit. 3, § 1, p. 515; *Inst. Just.* lib. 3, tit. 3, § 4. So of the

When it operates as payment.

And where a bill or note is given and accepted in *satisfaction and discharge* of a debt, it would appear not to be essential that the bill or note, to have this effect, should be negotiable. (*y*)

But it seems that the omission, on taking from a debtor the bill of a third person, to require the debtor's indorsement, is not, *per se*, sufficient proof that he was not to be liable for the precedent debt, if the bill were dishonored. (*z*)

And the mere fact of the creditor having taken a bill or note on account of his debt, will not suspend his right of action to recover such debt, during the currency of the instrument, provided such instrument be on an insufficient stamp; (*a*) or be a forgery; (*b*) or be a worthless bill fraudulently passed to him; that is, if the parties thereto were, at the time, persons of no property, and the debtor was then aware that the instru-

When taking
a bill or note
will be no
defence.

Scotch law. Thompson on Bills, 192, 194. An extinguishment, or an agreement that a note or bill given is to operate as such will not be implied from the use of such words as "in payment of the above account," in a receipt for the note or bill. Glenn *v.* Smith, 2 Gill & J. 493. But in Connecticut peculiar importance has been attached to a receipt which expresses that the note is given in full payment, as evidence of an agreement that the new note is received in payment of the account. Bonnell *v.* Chamberlin, 26 Conn. 492, per Ellsworth J. In Massachusetts the giving a negotiable note for a simple contract debt, is held to be *prima facie* evidence of payment of it, liable to be rebutted by circumstances showing a different intent. See Reed *v.* Upton, 10 Pick. 525; Wallace *v.* Agry, 4 Mason, 342; West Boylston Manuf. Co. *v.* Searle, 15 Pick. 230; Marston *v.* Boynton, 6 Met. 127; Whitcomb *v.* Williams, 4 Pick. 225. So in Maine: Descadillas *v.* Harris, 8 Greenl. 298; Varner *v.* Nobleborough, 2 Greenl. 121; Newall *v.* Hussey, 18 Maine, 249. See, also, Cornwall *v.* Gould, 4 Pick. 444; Wood *v.* Bodwell, 12 Pick. 269, 270; Watkins *v.* Hill, 8 Pick. 522; Bayley on Bills (2d Am. ed.), 395-413; Chapman *v.* Durant, 10 Mass. (Rand's ed.) 51, n. (*a*); Chapman *v.* Searle, 3 Pick. (2d ed.) 45, note. So in

Arkansas: Camp *v.* Gullett, 2 Eng. 524; Costar *v.* Davies, 3 English, 213. But the presumption that a negotiable note is taken in satisfaction of a preëxisting debt, and not as collateral security, is a presumption of fact only, and may be rebutted and controlled by evidence that such was not the intent of the parties; and it is a question of fact, on the evidence, whether the promissory note, given on the one hand and accepted on the other, was in satisfaction and discharge of the original debt. Per Shaw C. J. in Melledge *v.* The Boston Iron Co. 5 Cush. 158, 170.]

(*y*) See Lewis *v.* Lyster, 2 Cr., M. & R. 704, 706.

(*z*) *Ex parte* Blackburn, 10 Ves. 602.

(*a*) But in Swears *v.* Wells, 1 Esp. 317, the creditor, whose debt was due, agreed to take part down and the remainder by a note, payable at a future day. Part was paid, and a note for the remainder was given on a wrong stamp by mistake; and it was held by Lord Kenyon that the creditor, having taken part of the money according to the contract, was bound to wait until the time when the security would become due, unless, in the mean time, the party had refused to give a note properly stamped.

(*b*) Per Littledale J. Camidge *v.* Allenby, 6 B. & C. 373, 385.

ment was of no value, and that it had been concocted for dishonest purposes. (c)

On the other hand, there are some cases in which even the non-payment of the bill or note, when due, will not afford the creditor a right of action for the original demand.

Cases in which creditor cannot sue on original demand, although bill not paid.

Thus, the rule with regard to all negotiable instruments is, that if they are taken on account of a preëxisting debt, they operate as a discharge of that debt, unless the holder does all that the law requires to be done, in order to obtain payment of them. (d) Accordingly, if payment be made in the notes of a banking company, the holder is bound, within a reasonable time, either to circulate them, or to present them for payment. And if he do neither, and the bank meanwhile becomes insolvent, he must bear the loss. (e) And so if, by the law relating to negotiable instruments of this nature, the debtor himself was entitled to a regular presentment for payment, or to due notice of dishonor, and the creditor or holder be guilty of *laches* in regard to such presentment or notice, so that the debtor is exonerated from liability *on the instrument*; he will become equally relieved from his liability for the original debt. (f)

The defendant, being indebted to the plaintiff, gave him a promissory note for 45*l.*, which was dishonored. The latter afterwards agreed to accept 5*s.* in the pound, to be secured by an acceptance for 11*l.* 5*s.* to be drawn by the defendant upon his brother; and this acceptance was accordingly given; but the original note remained in the plaintiff's possession, and was to revive if the ac-

(c) *Stedman v. Gooch*, 1 Esp. 3, 5; per *Bayley J. Camidge v. Allenby*, 6 B. & C. 373, 382; *Hawse v. Crowe*, R. & M. 414.

(d) Per *Bayley J. Camidge v. Allenby*, 6 B. & C. 373, 382; and see *Peacock v. Pursell*, 14 C. B. N. S. 728.

(e) *Ib.* But if the creditor take provincial or country bank notes for his debt, and the bankers have failed, he may return the notes to the debtor within a reasonable time, instead of presenting them. *Rogers v. Langford*, 1 C. & M. 637.

(f) *Smith v. Mercer*, L. Rep. 3 Ex. 51; and see *Smith v. Wilson*, Anders. 187; *Bridges v. Berry*, 3 Taunt. 130. [So, where it is put out of the power of the debtor to do anything with or sue on the

security which he has given his creditor, in consequence of any arrangement made by the latter. Thus, when a creditor receives an order or draft from his debtor upon a third person for a given sum, alleged by the debtor to be due in a *short given time*, and the creditor takes the notes of such third person, payable in six and nine months, he makes the debt his own, and in case of non-payment of the notes, cannot call upon his debtor for the amount of the draft. *Southwick v. Sax*, 9 Wend. 122. It would, indeed, be different, if the creditor had been made an agent by his debtor in this transaction, with general power to adjust and settle the business.]

ceptance was not honored. The bill for 11*l.* 5*s.* was not paid by the acceptor, nor was payment thereof demanded of the defendant on the day it became due ; but on the following morning he tendered to the plaintiff the amount thereof, with expenses, — which the plaintiff refused to accept ; and thereupon brought an action on the note for 45*l.* ; and the court held, that the plaintiff was not entitled to recover. (*g*)

So, if a negotiable bill or note be given on account of a debt, and the creditor *lose* the bill or note, either *before or after* it is due, so that he cannot produce it at the trial, this will be an answer to an action for the debt, as well as to one upon the bill or note ; on the ground that the instrument might possibly get into the hands of a *bonâ fide* holder, who could sue the debtor thereon. (*h*) Nor, under these circumstances, will the debtor be liable, even although he may promise payment, unless such promise be made on a new and sufficient consideration. (*i*) But the remedy of the creditor, in such a case, is not absolutely extinguished ; it is merely suspended until the bill or note be found. (*k*)

And if the bill or note was not negotiable, the creditor will be entitled to sue for his demand, notwithstanding the loss of such bill or note. (*l*)

Again : if a creditor take from his debtor a bill drawn by the latter upon a third person, and, after the bill has been accepted, the creditor *alter* the bill in regard to the time of payment, he thereby makes the bill his own ; and it operates as a satisfaction of the original debt, although it be dishonored. (*m*)

But it is otherwise, where the bill which is given on account of

(*g*) Soward *v.* Palmer, 8 Taunt. 277.

(*h*) Crowe *v.* Clay (in error), 9 Exch. 604, reversing the judgment of the court of exchequer in Clay *v.* Crowe, 8 Exch. 295 ; Ramuz *v.* Crowe, 1 Exch. 167 ; Hansard *v.* Robinson, 7 B. & C. 90 ; Rolfe *v.* Watson, 4 Bing. 273. A court of equity will enforce payment of a lost bill on a proper indemnity being given. 9 & 10 Will. 3, c. 17, s. 3 ; Davis *v.* Dodd, 4 Price, 176. And by 17 & 18 Vict. c. 125, s. 87, there is now a similar power at law ; it being thereby made competent for the court or a judge, to order that the loss of

the bill shall not be set up as a defence, provided an indemnity be given. This order, however, can be obtained only at the instance of the plaintiff. Aranguren *v.* Schofield, 1 H. & N. 494.

(*i*) Hansard *v.* Robinson, 7 B. & C. 90 ; and see Jungbluth *v.* Way, 1 H. & N. 71.

(*k*) Dent *v.* Dunn, 3 Camp. 296.

(*l*) Wain *v.* Bailey, 10 A. & E. 616 ; recognized in Ramuz *v.* Crowe, 1 Exch. 167, and Price *v.* Price, 16 M. & W. 232, 243.

(*m*) Alderson *v.* Langdale, 3 B. & Ad. 660.

the original debt, is drawn by the creditor upon and accepted by the debtor ; for in this case, if the creditor do alter the bill he may still sue for the original debt. (*n*)

Nor does a creditor lose his remedy against his debtor for a precedent debt, merely by taking for it the bill or note of the *agent* of the debtor, without his consent. (*o*) But ^{Effect of taking bill of agent,} the principal will be discharged if the creditor, having it in his power to obtain payment in cash, yet elect to take the agent's bill. (*p*) Thus, where the seller of goods received from the purchaser an order upon his banker for the price, and the latter, — with whom money had been deposited to meet that and other demands, — offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which last the seller elected to take : it was held, that although the bill was afterwards dishonored, he could not sue the purchaser for the price of the goods. (*q*) And so, if the consignor or consignee of goods offer to pay freight for the same in cash, and the master take a bill in preference, such payment is good. (*r*)

It was once thought, that taking the bill or note of one of several members of a firm, for a partnership debt, could not operate as a discharge of the original claim against all ^{or partner.} the partners, in the event of the instrument being dishonored. (*s*) This notion was founded, principally, on the following case : A., B., and C. were partners in trade. A. retired from the firm, and notice of that fact was given to D., a creditor of the firm ; and also that B. and C. continued the business, and had assumed the funds, and charged themselves with the debts of the partnership. The balance due to D. was transferred to his credit by the new firm, and D. was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm afterwards became insolvent ; and it was held, that A. continued liable for the remainder of the debt due to D. from the old firm. (*t*)

(*n*) *Atkinson v. Hawdon*, 2 A. & E. 628 ;
and see *M'Dowall v. Boyd*, B. C. 12 Jur.
980.

(*o*) *Robinson v. Read*, 9 B. & C. 449,
and cases there cited.

(*p*) Per *Bayley J.* Ib. 455 ; [*Collyer*
Partn. § 1227 ; *Chapman v. Durant*, 10
Mass. 47 ; *French v. Price*, 24 *Pick.* 20,
21.]

(*q*) *Smith v. Ferrand*, 7 B. & C. 19.

(*r*) *Anderson v. Hillies*, 12 C. B. 499 ;
21 L. J. C. P. 150, 152 ; *Strong v. Hart*,
6 B. & C. 160 ; *Marsh v. Pedder*, 4 *Camp.*
257.

(*s*) 3 *Chit. Com. L.* 132.

(*t*) *David v. Ellice*, 5 B. & C. 196. And
see *Lodge v. Dicas*, 3 B. & Ald. 611.

But since the decision of the above case, the doctrine which it was supposed to establish has been much considered ; and the true rule with reference thereto would now seem to be : that although mere knowledge by the creditor, of the existence of such an arrangement amongst the members of a firm which is about to be dissolved, will not bind him : yet his own agreement to accept the transfer of liability will, (*t*¹) and that it is for the jury to say, whether or not he has entered into such an agreement. (*u*)

As regards the immediate parties to a bill or note, the debt between them which formed the consideration for the instrument, may be inquired into, either wholly or in part ; and the holder shall recover no more than the real amount of the debt due to him from the defendant. (*x*) But we have seen that, even between such parties, if the instrument were given upon a special contract, which has not been entirely rescinded, (*y*) or which is not wholly void on account of fraud, (*z*) so that the reduction claimed by the defendant would involve a question of unliquidated damages, a partial failure of consideration will afford no defence to an action on the bill. (*a*) Thus, if a bill be given for the price of a horse, warranted sound, but which is not so, and which has not been received back by the plaintiff ; or for the price of goods of less value than the amount charged ; (*b*) or for the premium agreed to be paid with an apprentice, who is

(*t*¹) [See *Waydell v. Luer*, 3 Denio 410 ; *Averill v. Loucks*, 6 Barb. 19 ; *Van Eps v. Dillaye*, 6 Barb. 244 ; *Collyer Partn.* (Am. ed. 1853) § 559 *et seq.* ; *Harris v. Lindsay*, 4 Wash. C. C. 98, 271 ; *Anderson v. Henshaw*, 2 Dana, 272 ; *Bernard v. Torrence*, 5 Gill & J. 383 ; *Isler v. Baker*, 6 Humph. 85 ; *Arnold v. Camp*, 12 John. 409 ; *Waugh v. Carriger*, 1 Yerger, 31 ; *Wildes v. Fessenden*, 4 Met. 12 ; *Chase v. Vaughan*, 30 Maine, 412 ; *Wilkins v. Reed*, 6 Greenl. 220, 221, per Mellen C. J. ; *Herring v. Langer*, 3 John. Cas. 91 ; *Schermerhorn v. Laines*, 7 John. 310 ; *Smith v. Rogers*, 17 John. 340 ; *Muldon v. Whitlock*, 1 Cowen, 290 ; *Kean v. Dufresne*, 3 Serg. & R. 233. Where there are several joint debtors, taking the note of one for the amount of the debt discharges the others, if the note was taken as payment, and with the intent to discharge others.

Higgins v. Packard, 2 Hall, 547 ; *Bayley on Bills* (2d ed.), 399 to 401 ; *Bonnell v. Chamberlin*, 26 Conn. 487.]

(*u*) *Lyth v. Ault*, 7 Exch. 669 ; 21 L. J. Exch. 217 ; *Thompson v. Percival*, 5 B. & Ad. 925 ; *Hart v. Alexander*, 2 M. & W. 484 ; 1 Smith L. C. 149 b. *Lodge v. Dicus* may now be considered as overruled. Per Martin B. *Lyth v. Ault*, *supra*.

(*x*) *Byles on Bills*, 93.

(*y*) See *ante*, 1094.

(*z*) *Lewis v. Cosgrave*, 2 Taunt. 2 ; *Archer v. Bamford*, 3 Stark. 175.

(*a*) See *Warwick v. Nairn*, 10 Exch. 762 ; *Trickey v. Larne*, 6 M. & W. 278.

(*b*) *Wells v. Hopkins*, 5 M. & W. 7 ; *Solomons v. Turner*, 1 Stark. 51 ; *Morgan v. Richardson*, 1 Camp. 40 ; 7 East, 483 ; *Tye v. Gwynne*, 2 Camp. 346 ; *Obbard v. Betham*, Moo. & M. 483.

bound by an apprenticeship deed not properly stamped, but under which the master has kept and instructed the apprentice for a time, and which might be rendered valid by being properly stamped; (c) or for the amount of a premium to be paid by the defendant to the plaintiff, for a lease to be granted by the latter, of certain premises of which the defendant has had possession, but which lease the plaintiff has refused to grant; (d) or for part of the price, payable by instalments at stipulated periods, of an estate sold subject to a mortgage, — but which has not been conveyed, solely in consequence of the mortgagee refusing to join in the conveyance, so that the contract is still open; (e) or for the price of communicating a supposed new discovery, which turns out to be of less value than was anticipated: (f) in these cases the plaintiff shall recover the full amount secured by the bill or note, leaving the defendant to obtain redress by a cross action. (g)

(c) *Mann v. Lent*, 10 B. & C. 877.

(d) *Moggridge v. Jones*, 14 East, 486.

(e) *Spiller v. Westlake*, 2 B. & Ad. 155.

(f) *Day v. Nix*, 9 Moore, 159.

(g) See per *Hullock B. Gascoyne v. Smith*, M'Clel. & Y. 349. [The rule stated in the text prevails in England; but a different rule has been adopted to some extent in the United States. After a full consideration of the cases in *Harrington v. Stratton*, 22 Pick. 510, it was held, in an action by the payee against the maker of a promissory note given for the price of a chattel, that it is competent for the maker to prove, in reduction of damages, that the sale was effected by means of false representations of the value of the chattel, on the part of the payee, although the chattel had not been returned or tendered to him. This decision is supported by the cases of *Spalding v. Vanderclock*, 2 Wend. 431; *Burton v. Stewart*, 3 Ib. 236; *Chancellor Walworth* in *M'Allister v. Reab*, 4 Wend. 483; *Perley v. Balch*, 23 Pick. 286, 287; *Hammatt v. Emerson*, 27 Maine, 308. See *De Sewhanberg v. Buchanan*, 5 C. & P. 343; *Mulford v. Shepherd*, 1 Scam. 587. In the above case of *Harrington v. Stratton*, 22 Pick. 517, Mr. Justice Dewey remarked: "The strong argument for the admission of such evidence, in reduction

of damages in cases like the present, is, that it will prevent circuity of action. It is always desirable to prevent a cross action, where full and complete justice can be done to parties in a single suit, and it is upon this ground, that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle allowing evidence in defence or in reduction of damages to be introduced, rather than to compel the defendant to resort to his cross action. As it seems to us, the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes, between the original parties to the same, as to actions on the original contract of sale, and holding that, in either case, evidence of false representations as to the quality or character of the article sold, may be given in evidence to reduce the damages, although the article has not been returned to the vendor." And in *Mixer v. Coburn*, 11 Met. 559, 561, Mr. Chief Justice Shaw said: "We suppose it settled by the modern practice, that to avoid circuity of action, the vendee of personal property may show, in reduction of damages, such ground of deceit or breach of express or

Where an action is brought upon a bill of exchange or promissory note, and also for goods sold, and the plaintiff proves the bill or note, without showing the consideration for it, and also the goods sold; and it appears that the price became due before the bill or note was given; a presumption arises that the instrument was given in payment for the goods. (*h*) And where, in an action on a note, with a count on an attorney's bill for 300*l.*, it appeared that the note, which was for 87*l.* 4*s.*, was given at a time when business to the extent of 17*l.* only had been done; still, as the plaintiff gave no evidence of the consideration for the note, Lord Tenterden C. J. left it to the jury to say, whether the note had been given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction. (*i*)

Where it is part of the original terms of a contract for the sale of goods, that the price shall be paid by a bill or note, and the party who is to give the bill or note refuses to do so on request; the remedy to be adopted, during the period of credit agreed upon, is by a special action for not accepting, or for not giving the bill or note; and the common count for goods sold is not maintainable, until *after* the expiration of such credit. (*k*) Thus, where A. sold goods to B. which were to be paid for partly in cash, and the residue by bills at intervals of three months each; it was held that A. could not — upon non-payment of the money and non-delivery of the bills — sue as for goods sold and delivered, without waiting the expiration of the credit; but that his remedy was by special action on the contract. (*l*)

We have seen that payment of a smaller sum cannot in law be deemed a satisfaction of a larger. (*m*) And, although the giving and acceptance of a bill or note for an amount

implied warranty in the sale, as would be sufficient in law to sustain a cross action." Opposed to this are the decisions in *Thornton v. Wynn*, 12 Wheat. 183; *Pulsifer v. Hotchkins*, 12 Conn. 234; *Scudder v. Andrews*, 2 McLean, 464.]

(*h*) *Mutrie v. Harris*, Moo. & M. 322.

(*i*) *King v. Martin*, 3 C. & P. 347. [But there is no presumption in law that a note *not negotiable*, of the same amount with a preëxisting book debt, was taken as payment of that debt. *Bartlett v. Mayo*, 33

Maine, 518. And it is no defence to an action for such preëxisting debt, that such a note was given to the plaintiff for the same amount. *Ib.* And the plaintiff is not bound to produce such a note, if so given, or account for its loss at the trial. *Ib.*]

(*k*) *Mussen v. Price*, 4 East, 147; *Brooke v. White*, 1 N. R. 330; *Taylor v. Briggs*, Moo. & M. 30, note.

(*l*) *Paul v. Dod*, 2 C. B. 800; [*Hunnewell v. Grafton*, 10 Met. 454, 459.]

(*m*) *Ante*, 1101.

smaller than that of the debt, may be pleaded by way of accord and satisfaction to an action for such debt; (n) yet, it would seem, that the giving of such bill or note cannot be treated as a *payment* of the debt. And accordingly it appears, that if, to an action for 100*l.*, claimed in the declaration, the defendant were to plead, that the plaintiff took a bill for 50*l.*, for and on account of such 100*l.*, such a plea would be bad in substance. (o)

But the taking a negotiable bill or note for a debt operates during the currency thereof, or after it has been indorsed over, as a *primâ facie* discharge or payment of the debt; and it is therefore sufficient for the defendant to plead these facts, without showing in his plea that the note was paid; or that it was, by express agreement, taken absolutely as payment; or that the plaintiff has been guilty of laches in regard to it; or any other circumstances which negative the plaintiff's right to resort to his original demand, on the instrument being dishonored. (p)

For the same reason, where the creditor has taken the bill or note of a *third* person for his debt, and upon the dishonor of that instrument he brings an action for such original debt, and the debtor pleads that the bill or note was taken on account thereof; it is incumbent on the creditor to plead and prove such circumstances, as will obviate the effect of his having taken the bill, and revive

(n) *Sibree v. Tripp*, 15 M. & W. 23.

(o) See per Parke B. *Sard v. Rhodes*, 1 M. & W. 153, 155; *Thomas v. Heathorn*, 2 B. & C. 477; *Bolt v. Watson*, 4 Bing. 273. [In *Jenness v. Lane*, 26 Maine, 475, it was held that, if the holder of a note then due and payable, take a new note for a less sum, whereon the same person only is liable, payable in thirty days, and agree, that if the smaller note shall be paid at maturity, the maker shall be discharged from his liability on the larger one, the contract cannot be enforced for the want of a consideration; but should another person be also liable on the smaller note, as indorser thereof, the contract would have sufficient consideration to support it, and would be binding. Where such contract is made upon a sufficient consideration, and is a valid contract, still it does not of itself, at the time it is made, operate as a payment of the larger note, or dis-

charge the maker from his liability thereon; but to make out a defence to a suit upon that note, it must be made to appear that the smaller note was paid, or payment thereof tendered, at the time it became payable, or that payment was prevented by the wrong of the holder, or that he had adopted a new note in discharge of the old one. *Ib.* Such payment at the time the new note became payable, is not waived or excused, if the holder, being the whole time an inhabitant of another state, takes the new note with him to his place of residence; nor if he omits to make a demand and notify the indorser; nor if he does not notify the maker, that he elects to rely on payment of the old note; nor if he omits to return or offer the new note to the maker, until the time of trial. *Jenness v. Lane*, 26 Maine, 475.]

(p) See Chit. jun. Pl. 3d ed. 370, in *notis*.

the original demand; *e. g.* that he used reasonable diligence, by presenting the bill or note, to obtain payment thereof from the acceptor or maker; (*q*) or that, before the time for presentment elapsed, circumstances occurred which excused him from making such presentment, such as the bankruptcy of the maker or acceptor. (*r*) And it is held that, in such a case, the creditor is not bound to give his debtor notice of the bankruptcy, before the expiration of the time for presenting the bill or note; but only within a reasonable time after the fact of the bankruptcy came to his knowledge. (*r*)

But it seems that, where the debtor is not a party to the bill or note, he cannot require proof of a strict presentment for payment, or that he had formal notice of dishonor, according to the custom of merchants; and that, even where no presentment has been made, or notice given, this will be no defence if it appear that he was not thereby prejudiced. (*s*)

And, clearly, where a debtor hands over to his creditor, on account of his debt, a bill or note which is on a wrong stamp, or which is not negotiable, the latter may sue for the original debt, without proving either presentment or notice of dishonor. (*t*)

But although, where the debtor is the acceptor of the bill, or maker of the note, he is not entitled to have it presented for payment; yet, if the creditor sue him for the original demand, and it appear that a negotiable bill or note was given on account thereof, the plaintiff must produce it at the trial, (*t*¹) to show its dishonor, and that it is not held by a third person; (*u*) or he must show that it was dishonored, and has been destroyed; or that it is within his control, — *e. g.* that it lies protested for dishonor in the hands of his foreign agent. (*x*)

(*q*) 4 Anne, c. 9, s. 7; *Bridges v. Berry*, 3 Taunt. 130.

(*r*) *Robson v. Oliver*, 10 Q. B. 704. [See *Jenness v. Lane*, 26 Maine, 475, cited and stated in note (*o*), p. 1143.]

(*s*) *Goodwin v. Coates*, 1 Moo. & Rob. 221, 222, note (*u*); *Holbrow v. Wilkins*, 1 B. & C. 10; *Van Wort v. Woolley*, 3 B. & C. 439; *Murray v. King*, 5 B. & Ald. 165; *Swinyard v. Bowes*, 5 M. & S. 62.

(*t*) *Cundy v. Marriott*, 1 B. & Ad. 696; *Plimley v. Westley*, 2 Scott, 423.

(*t*¹) [See per Shaw C. J. in *Thurston*

v. Blanchard, 22 Pick. 18, 21; *Ayers v. Hewett*, 19 Maine, 281; *Jenness v. Lane*, 26 Maine, 475, 483.]

(*u*) See *Ramuz v. Crowe*, 1 Exch. 167; *Price v. Price*, 16 M. & W. 232.

(*x*) *Hadwen v. Mendizabel*, 10 Moore, 477; S. C. 1 C. & P. 20; *Burden v. Halton*, 4 Bing. 454. In the latter case, the action was for goods sold, for the price of which bills had been given by the defendant. At the trial, the plaintiff produced the bills, overdue and dishonored; but it appeared, that when the action was brought,

5. *Release.*

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|--|--|-------------------------------------|
| 1. Form and effect of express release. | | 3. To whom executed. |
| 2. By whom executed. | | 4. Of releases by operation of law. |

1. The release of a debt, without payment, may be effected either by the express act of the creditor, or by operation Form of release.
of law.

The general rule is, that a release by the creditor should be *under seal*; (*y*) and if it be under seal, no consideration is neces-

the bills were in the hands of third parties, who had sent them before the trial to the plaintiff, without any money passing. There was, however, no evidence that the bills had been transferred to such third parties *for value*; and the court held, that the action was maintainable. *Semble*, that if it had appeared that the third parties held the bills *for value*, when the action was brought, such action could not have been maintained.

(*y*) Co. Litt. 264 b; Bac. Abr. Release (A.); Cordwent *v.* Hunt, 8 Taunt. 596. [In Pennsylvania, where legal and equitable jurisdiction is exercised by the same court and jury, it was determined, in the case of Wentz *v.* De Haven, 1 Serg. & R. 312, that a seal is not necessary to a release of a debt secured by the most formal sealed instrument, and whether due or not. In Whitehill *v.* Wilson, 3 Penn. 405, the same court decided that a parol release of a judgment is sufficient in equity, but a consideration is necessary to support it; that it is not enough that it is in writing, if without a consideration. And it was said by Gibson C. J. delivering the opinion of the court: "In the case at bar, there was neither evidence nor pretence of consideration, beyond the mere benevolence of the creditor; and the direction [of the court below] would be without a shadow of support, were it not intimated in Wentz *v.* De Haven, 1 Serg. & R. 312, on the authority of Lord Mansfield's dictum in Martin *v.* Mowlin, 2 Burr. 279, that a parol gift or relinquishment of a mortgaged debt will release the mortgage itself, without regard to the questions of

consideration or actual delivery. It is obvious that Lord Mansfield's attention was occupied with the disputed operation of the statute of frauds, instead of the necessity of a consideration or delivery; and it is fair to intend that he had in view a gift accompanied by all the incidents necessary to give it validity. He is, therefore, not authority for the broad position, that a debt by specialty or of record may be released without consideration and by parol; nor does the opinion of the judges in Wentz *v.* De Haven go that far. The propriety of the judgment in that case is not to be disputed, the release being in favor of a child; but it is less easy to subscribe to another point of doctrine asserted in it, that the delivery of the agreement in writing to the party intended to be benefited, would have been a circumstance to cure a defect in the consideration, or perhaps to supply the place of it altogether. The paper, though not under seal, was certainly thought to have a peculiar effect, in consequence of its being, as was said, not a parol but a written declaration, the accuracy of which I may, with a sincere respect for the opinions of our learned and able predecessors, be permitted to controvert." . . . "The agreement, though in writing, was nevertheless parol, and the delivery of the written evidence of it, could no more dispense with the necessity of a consideration, than could the delivery of a promissory note dispense with it between the original parties by operating as a gift of the money; for surely the form of the transaction, by which a person is to part with his property, —

sary; (*z*) but if it be not, then the want of a consideration will render the instrument inoperative; (*a*) even although the debtor pay part of the debt, and the creditor give a receipt, expressing that such money is received in full of all demands. (*b*)

No particular form of words is necessary to constitute a valid release; but any words which show an evident intention to renounce the claim upon, or to discharge the debtor, are sufficient. (*c*) Thus, an acknowledgment that the party "is satisfied"; (*d*) or a covenant "not to sue," without any limitation as to time, (*e*) amounts to a release. (*e*¹)

So, if creditors agree, by indenture, to give their debtor a letter of license for a certain time; and the indenture contain a proviso that, if any creditor should molest the debtor within that time, the debtor should be exonerated from the debt due to such creditor, and that the indenture might be pleaded in

whether by a creation of a new debt, or the extinction of an old one, — cannot be thought to make a difference. Neither could it change the executory nature of the agreement, as being a symbolical delivery of the mortgage or bond accompanying it, which ought itself, as being the proper muniment of the title, to have been delivered up or cancelled. To deliver to the donee a memorandum of the gratuitous transfer of a bond retained by the donor, would no more pass the property in it, than would the gift of any other chattel in the same circumstances; and a gift of the debt to the obligor must certainly depend on the same principles. Whatever, then, may be the facility of proof, or certainty of intent, afforded by a written declaration, it can, if unsealed, have no peculiar or greater effect than if it were merely verbal." See *Shaw v. Pratt*, 22 Pick. 308.] When a release may be presumed, *Bigg v. Roberts*, 3 C. & P. 43; *Washington v. Brymer*, Peake Ad. Ca. 200.

(*z*) *Preston v. Christmas*, 2 Wils. 86.

(*a*) Per Bayley J. *Lodge v. Dicus*, 3 B. & Ald. 611, 614.

(*b*) *Fitch v. Sutton*, 5 East, 230.

(*c*) Co. Litt. 264; Com. Dig. Release (A. 1); Bac. Abr. Release (A.).

(*d*) *Hickmot's case*, 9 Co. 52 b.

(*e*) *Deux v. Jeffries*, Cro. El. 352; 1 Roll. Abr. 939, l. 50; *Ayliff v. Scrimshire*, 1 Show. 46; *Carivil v. Edwards*, 1 Show. 330; 2 Wms. Saund. 47 t; Bac. Abr. Release (A. 2); Com. Dig. Release (A. 1).

(*e*¹) [A covenant not to sue, without limitation of time, is a release. *Rosevelt v. Stackhouse*, 1 Cowen, 122; *Cuyler v. Cuyler*, 2 John. 186; *White v. Dingley*, 4 Mass. 433; *Upham v. Smith*, 7 Mass. 265; *Sewall v. Sparrow*, 16 Mass. 24; *Shed v. Peirce*, 17 Mass. 623; *Clark v. Russell*, 3 Watts, 213; *Sidwell v. Evans*, 1 Penn. 385; *Gibson v. Gibson*, 15 Mass. 112; *Tuckerman v. Newhall*, 17 Mass. 584; *Clopper v. Union Bank of Maryland*, 7 Har. & J. 92; *Reed v. Shaw*, 1 Blackf. 245; *Lane v. Owings*, 3 Bibb, 247; *Garnett v. Macon*, 2 Brock. 185; S. C. 6 Call, 308; *Guard v. Whiteside*, 13 Ill. 7; *Stratton v. Mason*, 15 Pick. 511. And the same rule applies for the same reason, to a promise or agreement, not under seal, not to sue a note of hand or other contract which likewise is not under seal. Per Wilde J. in *Foster v. Purdy*, 5 Met. 442, 443; *Warren v. Walker*, 23 Maine, 458, per Whitman C. J.]

bar of such debt ; such indenture will operate as a defeasance ; and, if an action be brought for such debt within the time, will be pleadable in bar thereof. (*f*)

But a covenant, or an agreement even on good consideration, not to sue upon a contract for a limited time, is not pleadable in bar of an action on such contract. (*g*) If, however, a covenant not to sue for a limited time, be contained in the same instrument which contains the covenant on which the action is brought, it may be pleaded in bar of such action ; provided it appear upon the construction of the whole instrument, that the latter covenant was intended to be qualified by the former. (*h*)

Covenant,
not to sue for
a limited
time.

And a release will be good, although it be made subject to be avoided by the happening of a condition subsequent, as for example, by the non-payment of a composition. (*i*)

Release
avoided by
condition
subsequent.

A contract *not under seal*, whether verbal or written, may, *before breach*, be discharged by parol. (*k*)

Thus, where the plaintiff declared that the defendant, for valuable consideration, assumed to go a certain voyage, in such a ship, before *August* following, and alleged

Contract not
under seal
may be dis-
charged by
parol before
breach.

(*f*) *Gibbons v. Vouillon*, 8 C. B. 483. And see *Legg v. Cheesebrough*, 5 C. B. N. S. 741. [Where a forfeiture is stipulated for in case the covenant not to sue within a limited period is violated, such covenant may be pleaded in bar of an action brought within the time limited. *Winans v. Huston*, 6 Wend. 471 ; *Pearl v. Wells*, 6 Wend. 291 ; *White v. Dingley*, 4 Mass. 433. A bond or covenant by the creditor to save harmless and indemnify the debtor against the debt, operates as a release of the debt. *Clark v. Bush*, 3 Cowen, 151.]

(*g*) *Ford v. Beech* (in error), 11 Q. B. 852, 871 ; *Webb v. Spicer*, 13 Q. B. 886, 898 ; *Moss v. Hall*, 5 Exch. 46, 50 ; *Thimbleby v. Baron*, 3 M. & W. 210 ; 2 Wms. Saund. 47 t ; and see *Wilson v. Braddyll*, 9 Exch. 718. [If the covenant be only not to sue for a limited time, the debtor's remedy is by suit on the covenant ; and it does not suspend the creditor's action. *Clopper v. Union Bank of Maryland*, 7 Harr. & J. 92 ; *Gibson v. Gibson*, 15 Mass. 112 ; *Hoffman v. Brown*, 1 Halst. 429 ; *Perkins*

Gilman, 8 Pick. 229 ; *Fullam v. Valentine*, 11 Pick. 159, 160 ; *Winans v. Huston*, 6 Wend. 471 ; *Berry v. Bates*, 2 Blackf. 119 ; *Guard v. Whiteside*, 13 Ill. 7 ; *Foster v. Purdy*, 5 Met. 442 ; *Johnson v. Daverne*, 19 John. 134 ; *Scriba v. Deanes*, 1 Brock. 173. But this latter doctrine does not apply to actions of assumpsit, and the creditor cannot sue before the period has passed. *Clopper v. The Union Bank of Maryland*, 7 Harr. & J. 103. But see *Dow v. Tuttle*, 4 Mass. 414 ; *Perkins v. Gilman*, 8 Pick. 230, 231, *contra*, in reference to this last proposition.]

(*h*) *Foley v. Fletcher*, 3 H. & N. 769.

(*i*) *Newington v. Levy*, L. R. 5 C. P. 607 ; in Cam. Scac. 6 Ib. 180.

(*k*) *Goss v. Lord Nugent*, 5 B. & Ad. 58, 65 ; per Lord Abinger, *Adams v. Wordley*, 1 M. & W. 374, 380 ; *Edwards v. Weeks*, 1 Mod. 262 ; *Mellward v. Ingram*, Freem. 195 ; S. C. 2 Mod. 44 ; Bac. Abr. Release (A. 1) ; Bull. N. P. 152. See *Price v. Dyer*, 17 Ves. 363.

a breach in the non-performance; to which the defendant pleaded, that, *before any breach* the plaintiff *exoneravit eum* of the said promise; on demurrer, the plea was held sufficient, without showing how he discharged him, or that such discharge was in writing. (*l*) And so, to a declaration founded on mutual promises to marry, it was held to be a good plea that, after the promises and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise and the performance thereof; without stating the special circumstances under which the discharge arose, or that there was any consideration for the same. (*m*)

And with reference to the release, before breach, of a contract within the statute of frauds, it is said, in the report of the case of *Goman v. Salisbury*, (*n*) that "the single point was, whether an agreement in writing, made since the statute of frauds and perjuries, might be discharged by parol? And the lord keeper held it might, and therefore dismissed the bill, which was brought to have the agreement executed in specie." And in the more recent case of *Goss v. Lord Nugent*, (*o*) the court of king's bench inclined to the same opinion. (*o*¹)

Contract under seal. But the breach of a contract *under seal* is not excused by there having been a parol license to break it. (*p*)

After breach release must be under seal. And *after breach* the discharge must, whether the contract be under seal or not, be by release under seal, unless it operate as an accord and satisfaction. (*q*)

(*l*) *Langden v. Stokes*, Cro. Car. 383.

(*m*) *King v. Gillett*, 7 M. & W. 55.

(*n*) 1 Vern. 240.

(*o*) 5 B. & Ad. 58, 65; but see per Cur. *Harvey v. Grabham*, 5 A. & E. 61, 73.

(*o*¹) [See *Emmet v. Dewhurst*, 3 Mac. & G. 587 (Am. ed.), note (*l*), 596, 597.

But in *Cummings v. Arnold*, 3 Met. 486, it was held, that a written contract for the sale of goods may be varied by a subsequent parol contract, though the original contract falls within the operation of the statute of frauds. It may be shown that, by the subsequent oral agreement, the time of performance of the original agreement, though within the statute of frauds, has been enlarged, or its terms varied, or waived or discharged. *Stearns v. Hall*, 9 Cush. 31. See, also, *Richardson v. Cooper*, 25 Maine, 450; *Blood v. Hardy*,

15 Maine, 61; *Franklin v. Long*, 7 Gill & J. 407; *Watkins v. Hodges*, 6 Harr. & J. 38; *ante*, 155, notes (*d*) and (*g*). But see *Stead v. Dawber*, 10 Ad. & El. 57.]

(*p*) Per Cur. *Doe d. Muston v. Gladwin*, 6 Q. B. 953, 962. [See *White v. Walker*, 31 Ill. 422.]

(*q*) Per Cur. *Foster v. Dawber*, 6 Exch. 839, 851; 20 L. J. Exch. 385; Bull. N. P. 152; [*Bender v. Sampson*, 11 Mass. 42; *Rosevelt v. Stackhouse*, 1 Cowen, 122; *Crawford v. Millspaugh*, 13 John. 87. A bond or other specialty may be released by a parol agreement between the parties, where the parol agreement is executed. *Dearborn v. Cross*, 7 Cowen, 48. See *Delacroix v. Bulkley*, 13 Wend. 71; *Farley v. Thompson*, 15 Mass. 18; *Wiswall v. M'Gowan*, 1 Hoff. 125. But not where the parol agreement is executory. *Smith*

This rule, however, does not apply to bills of exchange or promissory notes, — an obligation by either of which can, by the law-merchant, be discharged at any time by parol. (r)

Except in case of bills of exchange.

A debt of record may be discharged by release under seal. (s)

Debt of record.

Where there is a *debitum in presenti*, a release of "all actions or demands" discharges it, although the money be not payable until a future day. (t) So a general release, after action brought, discharges not only the debt but also all damages and costs. (u) And so, if a transaction which lays the foundation of a future liability, has occurred at the time of the release, a general release of all causes of action for any matter which has happened down to the time of the release, will discharge the releasee from all liability in respect of such transaction. But a party cannot release all causes of action that may arise or accrue after the execution of a release. (x)

Effect of general release.

And the effect of a release may be, to prevent any debt from ever coming into existence. Thus, where certain dividends were assigned to the defendant by deed, which contained a clause stating that the whole purchase-money had been paid; and released the same; it was held that, inasmuch as there could not be any debt until the execution of the deed, and, by the execution of the deed itself, such debt was released; there never was a time at which there was any duty on the part of the defendant, to pay the money in question. (y)

v. Lewis, 24 Conn. 624. A contract in writing will not be deemed to have been waived by a mere executory parol agreement entered into by the parties, to vary or modify its terms. Adams v. Nichols, 19 Pick. 275; Mill Dam Foundry v. Hovey, 21 Pick. 417, 429.]

v. Bridges, Cro. Jac. 300. [And this is true, although the debt or demand be upon notes taken by the releasor in his own name for goods sold by him as factor. Deland v. The Amesbury W. & C. Manuf. Co. 7 Pick. 244. A release technically operates only on a present interest. But when there is a present right to take effect in futuro, such a right may be presently released. Woods v. Williams, 9 John. 123. See Pierce v. Parker, 4 Met. 80.]

(r) Foster v. Dawber, 6 Exch. 839; 20 L. J. Exch. 385. And it is said, that there may be an express renunciation of his claim by the holder, without consideration. Byles on Bills, 10th ed. 197. But as to this, *quære*? See M'Manus v. Bark, L. R. 5 Ex. 65.

(u) See Tetley v. Wanless, L. R. 2 Ex. 275.

(s) Barker v. St. Quentin, 12 M. & W. 441.

(x) See per Best C. J. Radburn v. Morris, 4 Bing. 649, 652. [Hubbard J. in Pierce v. Parker, 4 Met. 80.]

(t) Co. Litt. 291; Com. Dig. Release (E.); Bac. Abr. Release (I. 1, 2); Tynan

(y) Baker v. Heard, 5 Exch. 959; 20 L. J. Exch. 444.

How construed.

So a release shall be construed, according to the particular purpose and intent for which it was made. (z)

How restrained in equity.

And a court of equity will interfere, for the purpose of restraining a release which is general in its terms, to that which was in the contemplation of the parties at the time it was executed. (a)

How by evidence.

So where, to a plea of release, the plaintiff replied, 1st, *non est factum*; and, 2dly, that a blank was left in the deed for the plaintiff's debt, which, after the execution of the deed by him, was filled up erroneously, and without his authority, with a sum of 337*l.*; and the jury found, that the debt which the parties meant to be released was the balance, after deducting a sum of 142*l.* from the 337*l.*; it was held, that this entitled the plaintiff to a verdict on both issues. (b) But it has been held that, where a party releases another from all claims and demands whatsoever in respect of a particular matter, he cannot be afterwards let in to say, that he had not been paid all that was then due in respect of that matter, so as to be able to sue for the difference. (c)

May be restrained by recital.

Again: a general release may be restrained in its operation, by a recital therein. (d) Thus, where a deed containing a general release of all debts, recited that the releasee had previously agreed to pay the releasor the sum of 40*l.*, for the possession of certain premises, and that, "in consideration of the said sum of 40*l.*, being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* apiece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, and from the same respectively did release, &c.; and there was also a receipt for the sum of 40*l.* indorsed on the release; but it appeared, on an action being afterwards brought for this sum, that,

(z) Per Dallas C. J. *Solly v. Forbes*, 2 B. & B. 38, 47; and see *Morley v. Frear*, 6 Bing. 547.

(a) See *Lyall v. Edwards*, 6 H. & N. 337; where a replication, on equitable grounds, to a plea of release, was held good, because it showed facts which brought the case within the rule stated in the text.

(b) *Fazakerly v. M'Knight*, 6 E. & B. 795.

(c) *Harding v. Ambler*, 3 M. & W. 279.

(d) Per Jervis C. J. *Boyes v. Bluck*, 13 C. B. 652, 672; Bac. Abr. Release (K.); *Payler v. Homersham*, 4 M. & S. 423; *Twopenny v. Young*, 3 B. & C. 210; [*Lamb v. Clarke*, 9 Mass. 235; *Rosevelt v. Stackhouse*, 1 Cowen, 122; *Rich v. Lord*, 18 Pick. 322; *Learned v. Bellows*, 8 Vt. 79.] Where the words of a release are clear, it operates as an estoppel. *Harding v. Ambler*, 3 M. & W. 279; *Baker v. Dewey*, 1 B. & C. 704.

in fact, it had never been paid ; it was held, that the deed of release was no *estoppel*, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* (*e*) And so, where to an action of covenant, brought by S. against J. and another, a release was pleaded, which began by reciting, "that various disputes were subsisting between S. and J.; and actions had been brought by them against each other, which were still depending, and that it had been agreed between them, that, in order to put an end thereto, J. should pay S. 150*l.*, and each of them should execute a release to the other of all actions, causes of action, and claims brought by him, or which he had against the other ;" and the release then proceeded, in the usual general words, to release all actions, &c., whatsoever ; it was held, that the effect of the general words was confined, by the recital, to actions then commenced, in which S. was the party on one side, and J. the party on the other ; and that it could not be pleaded in bar to an action brought by S., against J. and another, jointly. (*f*)

So, a release may be made to extend to part only of a debt or claim. (*g*)

But the plaintiff cannot set up a parol exception to a release under seal. (*g*¹) And therefore where, to an action by the indorsees against the maker of a promissory note, the plea was : that the promise was a joint and several one by the defendant and A., to whom one of the plaintiffs executed a release under seal ; a replication, that the release was executed at the request of the defendant ; and that afterwards, and whilst the note was unpaid, he, in consideration of such release, ratified his promise, and promised to remain liable to the plaintiffs for the amount of the note, was held bad. (*h*)

2. A release of a debt, or of a claim to damages, by one of several joint creditors, whether they be creditors in their private characters, or as executors, is, in law, a dis-

But not by
parol excep-
tion.

By whom
executed.

(*e*) *Lampon v. Corke*, 5 B. & Ald. 606.

(*f*) *Simons v. Johnson*, 3 B. & Ad. 175.

(*g*) 2 Roll. Abr. 413, tit. Release (H.), pl. 1.

(*g*¹) [But see *Learned v. Bellows*, 8 Vt. 79. An agreement, under seal, which com-

promises a suit, does not prevent either party from setting up and proving a parol contract, that one of the parties should pay the costs. *Morancy v. Buford*, 1 McLean, 195.]

(*h*) *Brooks v. Stuart*, 9 A. & E. 854.

charge of the debt. (*i*) And where, to a declaration on a policy of insurance on goods on board a ship, at the suit of D. W. and A. W., which alleged that the policy was made by them, as well in their own names, as for and in the name of every other person to whom the same did appertain; and then averred that one T. Z., and the plaintiff, A. W., or one of them, were, or was then, and from thenceforth, until the loss, interested in the goods; the defendant pleaded a release by D. W., for himself and his partner, A. W.; it was held, that this plea was a good answer to the action; because, whatever constitutes an answer to the demand for which the action is brought, as against the plaintiff on the record, is a bar to that action, although brought for the benefit of others; provided they cannot enforce their claim, except by suing in the name of such plaintiff. (*k*)

It seems, however, that if, at the time the release is executed by the creditor, there be a debt due to him individually, and also a debt due to a firm of which he is a member, — his execution of the instrument *primâ facie* imports a release of his individual debt only. (*l*) And even where, in such a case, the creditor executes the release for himself “and partners,” this term will be construed according to its ordinary meaning; so that, unless the context explain it otherwise, or there be no other joint debt, it will not be extended to include debts due to a joint stock company of which such creditor was, at the time, a member. (*m*)

(*i*) See Bac. Abr. Release (D.), (E.); Anon. Dy. 23 b, margin; Jacomb *v.* Harwood, 2 Ves. sen. 267; per Cur. Barker *v.* Richardson, 1 Y. & J. 362; [Murray *v.* Blatchford, 1 Wend. 583; Decker *v.* Livingston, 15 John. 479; Austin *v.* Hall, 13 John. 286; Pierson *v.* Hooker, 3 John. 68; Bulkley *v.* Dayton, 14 John. 387; Napier *v.* M’Leod, 9 Wend. 120; Smith *v.* Stone, 4 Gill & J. 310; Bruen *v.* Marquand, 17 John. 58; Halsey *v.* Whitney, 4 Mason, 206, 232; 3 Kent, 47, 48; Collyer Partn. § 468, and notes; Tuckerman *v.* Newhall, 17 Mass. 581; Wiggin *v.* Tudor, 23 Pick. 444.]

(*k*) Wilkinson *v.* Lindo, 7 M. & W. 81, 87; and see Gibson *v.* Winter, 5 B. & Ad. 96.

(*l*) Per Lord Abinger, Bain *v.* Cooper,

9 M. & W. 701, 707. [Where one partner signed a general release to a debtor of the firm, and it did not appear whether it was intended to apply to separate or to partnership demands, or that the releasing partner had, on his separate account, any demand against the debtor, the release was held a discharge from debts due to the partnership. Emerson *v.* Knower, 8 Pick. 63. In a case where it was apparent that a release by one partner, in the name of the firm, was intended to affect and cancel partnership demands, the release being for all demands, it was held, that parol proof was not admissible to show that a particular debt was not intended to be released. Pierson *v.* Hooker, 3 John. 68.]

(*m*) Per Lord Abinger and Parke B., Bain *v.* Cooper, 9 M. & W. 708, 709.

So a party beneficially interested, but having no legal interest, and not being the plaintiff on the record, cannot release the debt, so as to defeat the remedy at law. (*n*)

And although, as we have seen, a covenant not to sue will operate as a release; yet a covenant by A., not to sue the defendant for any debt due from him to A., cannot be pleaded as a release, in bar to an action by A. and B. for a debt due to them jointly. (*o*)

A release executed by a bankrupt, after an act of bankruptcy committed by, and available against him for adjudication, will be valid, if it be made before the date of the order of adjudication, provided the releasee had not, at the time, notice of such prior act of bankruptcy. (*p*)

Release by
bankrupt.

But a plea *puis darrein continuance*, of a release by one of several plaintiffs, was set aside without costs, on the terms of indemnifying the plaintiff, who had released the action, against the costs of it, although the consent of such plaintiff had not been obtained before action brought; it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of a person who was insolvent. (*q*) So, where an action was brought in the names of A. and B., to recover a debt which had accrued due to them as partners; and it appeared that their partnership had been dissolved, upon the terms that A. should collect the debts due to, and satisfy the claims upon the firm; and that B., as the defendant knew, had no beneficial interest; the court, on motion, set aside a release by B. to the defendant, as fraudulent, and ordered the release to be given up to be cancelled. (*r*) And it is a general rule, that if a

When the
court will set
aside a re-
lease.

(*n*) *Quick v. Ludborrow*, 3 Bulst. 29; *Hackett v. Martin*, 8 Greenl. 77; *Frear v. S. C. Roll. Rep.* 196; 2 Roll. Abr. 402; *Evertson*, 20 John. 142.]
Bac. Abr. Release (D.). [After the assignment of a *chose in action*, no subsequent act or declaration of the assignor can modify or control it. *Hackett v. Martin*, 8 Greenl. 77; *Mathews v. Haughton*, 1 Fairf. 420; 2 Green, 510; 2 Phillips Ev. (Cowen & Hill's ed.) 163, note 172, and numerous cases cited; *Frear v. Evertson*, 20 John. 142; *Eastman v. Wright*, 6 Pick. 322. Nor can the assignor in such case be admitted a witness for the debtor, in an action brought against him in the name of the assignor, for the benefit of the assignee.

Hackett v. Martin, 8 Greenl. 77; *Frear v. Evertson*, 20 John. 142.]

(*o*) *Walmesley v. Nelstrop*, 11 A. & E. 216; Bac. Abr. Release (A. 2).

(*p*) See 32 & 33 Vict. c. 71, s. 94; and *Mavor v. Pyne*, 3 Bing. 285.

(*q*) *Mountstephen v. Brooke*, 1 Chit. 390.

(*r*) *Barker v. Richardson*, 1 Y. & J. 362.

[One partner cannot release a debt due to the firm, even during the partnership, in consideration of a debt due from him individually; and if such appear to be the fact on the face of the release, it is void. *Gram v. Caldwell*, 5 Cowen, 489. See *Emerson v. Knowler*, 8 Pick. 63.]

trustee, (*s*) or merely nominal plaintiff, (*t*) release an action, to the prejudice and without the consent of the party beneficially interested, — as in the case of a release by a husband, separated from his wife, of a debt due from a third person, to which she was beneficially entitled, (*u*) — the court will, on motion, set aside the plea, and order the release to be delivered up to be cancelled. (*x*)

But, where the party releasing has an interest in the subject-matter of the action, it is necessary to show a clear and strong case of fraud and injustice, in order to induce the court to set the release aside. (*y*) And if the party who objects to the release, does not apply to the court to set it aside, the judge at the trial must give it effect, and can only regard the legal rights of the parties as they appear upon the record. (*z*)

3. A release to one of several joint contractors operates in general, as a discharge of all, (*z*¹) because unless this were so, the co-debtor, after paying the debt, might sue him

To whom
executed. (*s*) *Manning v. Cox*, 7 Moore, 617.

(*t*) A solvent partner, in whose name together with that of the trustee of a bankrupt partner, an action or suit has been commenced, cannot release the debt or demand to which such action or suit relates. 32 & 33 Vict. c. 71, s. 105.

(*u*) *Innell v. Newman*, 4 B. & Ald. 419.

(*x*) *Rawstorne v. Gandell*, 15 M. & W. 304; *Legh v. Legh*, 1 B. & P. 447; *Baerman v. Rodenius*, 7 T. R. 670 b; *Payne v. Rogers*, 1 Dougl. 407; *Hickey v. Burt*, 7 Taunt. 48; *Anon.* 1 Salk. 260. And this may now be made the subject of a replication, on equitable grounds, to a plea of release. *De Pothonier v. De Mattos*, E., B. & E. 461.

(*y*) *Rawstorne v. Gandell*, 15 M. & W. 304; *Phillips v. Clagett*, 11 M. & W. 841; *Crook v. Stephens*, 7 Scott, 848; *Jones v. Herbert*, 7 Taunt. 421; *Barker v. Richardson*, 1 Y. & J. 362; [*Collyer Partn.* § 468, and notes; 3 Kent, 48. In Massachusetts, it is held, that, in case of a release of this description, the question of fraud must be tried by the jury. *Eastman v. Wright*, 6 Pick. 316; *Loring v. Bracket*, 3 Pick. 403.] When concealment of a material fact avoids a release, *Bowles v. Stewart*, 1 Sch. & Lef. 209.

(*z*) *Alner v. George*, 1 Camp. 392; *Mountstephen v. Brooke*, 1 Chit. 391, note. See *Baerman v. Radenius*, 7 T. R. 670; *Skaife v. Jackson*, 3 B. & C. 421.

(*z*¹) [*Collyer Partn.* § 606, and notes, and cases cited. But it must be a technical release under seal. *Shaw v. Pratt*, 22 Pick. 308; *Pond v. Williams*, 1 Gray, 630, 636; *Walker v. McCullough*, 4 Greenl. 421; *Harrison v. Close*, 2 John. 449; *Rowley v. Stoddard*, 7 John. 209; *De Zeny v. Bailey*, 9 Wend. 336; *Putnam v. Lewis*, 8 John. 304; *Johnson v. Weed*, 9 John. 310; *Mason v. Jewett*, 2 Dana, 107; *Frink v. Green*, 5 Barb. 450. See *Wiggin v. Tudor*, 23 Pick. 435; *Lunt v. Stevens*, 24 Maine, 534. In Pennsylvania, however, it has been determined, that a receipt not under seal, to one of several joint debtors for his proportion of the debt, discharges the rest. *Milliken v. Brown*, 1 Rawle, 391; *Todd J. diss.* See the opinion of the court, which was delivered by *Huston J.* A release to one of two joint tortfeasors is equivalent to a satisfaction, and inures to the benefit of both. *Brown v. Marsh*, 7 Vt. 320. But if one of several joint debtors be discharged by operation of law, without the consent of the obligee, and by no act of his, it will not take away

who had been released, for contribution ; and so, in effect, he would not be released at all. (*a*) And this rule holds even although the contract be several as well as joint, (*b*) or the release were given on a parol undertaking by the party not expressly released, that he should remain liable. (*c*)

But the legal operation of a release to one of several joint contractors, may be restrained by the express terms of the instrument itself. (*d*) Thus, where a release was given to one of two partners, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other partner, and that he might, notwithstanding the release, sue them jointly ; a joint action having been commenced, the party released pleaded the release, to which the plaintiff replied that he sued him only to recover against the other ; and, on demurrer, the replication was held good. (*e*)

Effect of release to one of several may be restrained.

So, where a release to one of two sureties, who had entered into a joint and several covenant to pay an annuity in default of payment by the grantor, was accompanied by a proviso that such release should not prejudice the right of the grantee, to enforce payment thereof against the grantor and the other surety, or either of them ; it was held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release. (*f*)

Indeed, in these, and the like cases, the courts endeavor to carry out the intention of the parties, by holding the instrument to be a covenant not to sue, and not a release ; (*g*) the rule being, that a covenant not to sue does not operate to discharge any other person than him with whom

In such cases, release is held to amount to covenant not to sue.

the remedy against the other debtors. *Ward v. Johnson*, 13 Mass. 152 ; *Robertson v. Smith*, 18 John. 459 ; *Tooker v. Bennett*, 3 Caines, 4 ; *Hosack v. Rogers*, 8 Paige, 229.]

(*a*) *Per Cur. North v. Wakefield*, 13 Q. B. 536, 541.

(*b*) *Per Cur. Nicholson v. Revell*, 4 A. & E. 675, 683 ; *Cheetham v. Ward*, 1 B. & P. 630.

(*c*) *Cocks v. Nash*, 9 Bing. 341 ; *Co. Litt.* 232 a ; 2 Roll. Abr. 410, l. 47, 412 (G.), pl. 4 ; *Bac. Abr. Release* (G.).

(*d*) *North v. Wakefield*, 13 Q. B. 536 ;

Twopenny v. Young, 3 B. & C. 211 ; *Lancaster v. Harrison*, 6 Bing. 726.

(*e*) *Solly v. Forbes*, 2 B. & B. 38. [See *Bank of Chenango v. Osgood*, 4 Wend. 607 ; *Mason v. Jewett*, 2 Dana, 107.]

(*f*) *Thompson v. Lack*, 3 C. B. 540.

(*g*) *Per Cur. Price v. Barker*, 4 E. & B. 760, 777 ; *per Lord Cranworth C. Owen v. Homan*, 4 H. L. Cas. 1037 ; overruling the dictum of Lord Truro, *Owen v. Homan*, 20 L. J. Chanc. 314, 325 ; [3 Mac. & G. 378] ; and see *Willis v. De Castro*, 4 C. B. N. S. 216.

it is entered into, and that therefore it does not exonerate parties who are jointly liable with him. (*h*)

So it was held, that a landlord who sued a sheriff for not reserving a year's rent on an execution against his tenant, and, under the old practice, released the tenant from the rent, after the jury were sworn, in order to make him a witness, did not thereby bar his right to recover the rent from the sheriff. (*i*)

So a deed *inter partes* cannot operate as a release to strangers, although it contain apt words of release. (*k*)

The effect of a release to the principal, upon the liability of the surety, has been already considered. (*l*)

4. There are also cases in which a debt may be released or discharged by operation of law : *e. g.* by the creditor making his debtor, or one of two or more joint and several debtors, his executor, either alone or with others ; for he cannot have an action against himself. (*m*) And where the payee of a promissory note appointed the maker his executor, it was held that the debt was discharged, and that an action could not be maintained on the note, even by a person to whom the executor had indorsed it. (*n*)

(*h*) *Lacy v. Kynaston*, 2 Salk. 575 ; 2 *Ld. Raym.* 959 ; *Dean v. Newhall*, 8 T. R. 168 ; *Twopenny v. Young*, 3 B. & C. 212 ; [*Frink v. Green*, 5 Barb. 455 ; *Lane v. Owings*, 3 Bibb, 427 ; *Shed v. Peirce*, 17 Mass. 623 ; *Catskill Bank v. Messenger*, 9 Cowen, 37 ; *Bank of Chenango v. Osgood*, 4 Wend. 607 ; *Rowley v. Stoddard*, 7 John. 207 ; *Chandler v. Herrick*, 19 John. 129 ; *Durell v. Wendell*, 8 N. H. 369 ; *Collyer Partn.* § 608, and note ; *Couch v. Mills*, 21 Wend. 424 ; *Goodnow v. Smith*, 18 Pick. 416 ; *McLellan v. Cumberland Bank*, 24 Maine, 566. Nor does it operate as a release to the covenantee, who, if sued, will be left to his action for redress. *Mason v. Jewett*, 2 Dana, 107. But see *Walker v. M'Cullough*, 4 Greenl. 421 ; *Garnet v. Macon*, 6 Call, 308.]

(*i*) *Thurgood v. Richardson*, 7 Bing. 428.

(*k*) See *Storer v. Gordon*, 3 M. & S. 308 ; *Bac. Abr. Release* (G.).

(*l*) *Ante*, 774.

(*m*) *Co. Litt.* 264 b ; *Dorchester v. Webb*, Sir W. Jones, 345 ; *Com. Dig. Release* (A. 2), *Administration* (B. 5) ; *Bac. Abr. Release* (B.) ; *Cheetham v. Ward*, 1 B. & P. 630. See *Ford v. Beech*, 11 Q. B. 852, 870 ; 2 Wms. Ex'ors (4th ed.) 1129 ; [*Allin v. Shadburne*, 1 Dana, 69. The naming a debtor executor, and his accepting the trust, does not in Massachusetts extinguish the debt. *Winship v. Bass*, 12 Mass. 199. See *Stevens v. Gaylord*, 11 Mass. 266 ; *Kinney v. Ensign*, 18 Pick. 232 ; *Hobart v. Stone*, 10 Pick. 220 ; *Ritchie v. Williams*, 11 Mass. 50 ; *Yelv.* 160, n. (1) ; *Biglow v. Biglow*, 4 Ham. 138 ; *Pusey v. Clemson*, 9 Serg. & R. 208 ; *Story v. Ips. Manuf. Co.* 5 Met. 310. Where a creditor by will, leaves a legacy to his debtor, it is not a release or extinguishment of the debt. *Ricketts v. Livingston*, 2 John. Ch. 97.]

(*n*) *Freakley v. Fox*, 9 B. & C. 130.

But the fact of the debtor appointing a creditor his executor, will not discharge the debt of the latter, unless he act as executor; (*o*) nor unless the executor has assets, which he may retain in payment of the debt. (*p*)

So, if a *feme* creditor marry her debtor, or one of two joint debtors, the debt is discharged. (*q*)

But a bond, conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor marrying her, and intended for her benefit if she should survive, is not released by their marriage. (*r*) And where a man, by deed, granted to a woman, for her separate use, an annuity for life, payable half-yearly, and afterwards married the grantee, and died leaving her him surviving; it was held that the annuity had not been extinguished by the marriage, but only suspended; and that the widow was entitled to recover the arrears of the annuity, which had accrued since her husband's death. (*s*)

So where rent was due from A. to B., in respect of the occupation of premises by the former as tenant to the latter; and, after the time when such rent became due, B. granted a lease of those premises to A., for a term which was therein expressed to commence from a day before the said rent became due; it was held, that the granting of the lease did not operate as a release to A. of such rent. (*t*)

So if a creditor, under an arrangement with the other creditors and the debtor, accept, or agree to accept, part of his demand as a *composition*, or in full for his demand; his claim to the remainder is in law extinguished, even although there be not any release by deed; because the agreement of the other creditors, to accept a composition on their debts, is a good consideration for the giving up, by each, of his claim for the residue. (*u*)

So an agreement entered into between the debtor, and any num-

(*o*) *Rawlinson v. Shaw*, 3 T. R. 557.

(*p*) 2 Wms. Ex'ors (4th ed.), 1129; *Lowe v. Paskett*, 16 C. B. 500.

(*q*) Co. Litt. 264 b; [*Allin v. Shadburne*, 1 Dana, 69.]

(*r*) *Milbourn v. Ewart*, 5 T. R. 381.

(*s*) *Fitzgerald v. Fitzgerald*, L. Rep. 2 P. C. 83.

(*t*) *Cooper v. Robinson*, 10 M. & W. 694.

(*u*) *Norman v. Thompson*, 4 Exch. 755;

and see per Cur. *Massey v. Johnson*, 1 Exch. 241, 255; *Good v. Cheeseman*, 2 B. & Ad. 328. An agreement to sign a composition deed will not bar an action for the full debt, if the creditor be prevented by the debtor or his trustees from signing. *Garrard v. Woolner*, 8 Bing. 258.

Effect of
payment and
receipt of
composition.

ber of his creditors less than the whole number, to take a composition for their debts, is binding on those who enter into such agreement. (*x*)

And so, where a creditor receives part of his debt as a composition, from a *third person*, who pays upon the faith that the debtor shall not be molested for the remainder, the right to the balance is discharged, without a release under seal. (*y*)

So, a creditor who executes a composition deed or agreement, — which purports to be made between the debtor and his trustees, “and the creditors whose names are subscribed, and debts set against their names,” — is bound by the terms of such deed or agreement, to the extent of his then existing debt, although he do not set the amount of his claim opposite to his signature. (*z*)

So we have seen, that a creditor who joins in a composition arrangement, which purports that all the debts and affairs of the debtor are thereby settled and released, cannot, by signing for part of his claim, privately keep back and sue for the remainder. (*a*)

And even if there be a proviso in a composition deed, that it shall be void if any creditor *refuse* to execute the same; it is incumbent on a creditor who seeks to avoid it after his execution thereof, to prove a positive *refusal* by some particular creditor to concur in the arrangement; mere evidence of his non-execution of the deed not being sufficient. (*b*) And where, by an agreement between the defendants and their creditors, all the defendants’ stock in trade was placed in the hands of trustees for the benefit of such creditors, and the defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all usual clauses; and the trustees, after having carried on the defendants’ business

(*x*) *Norman v. Thompson*, 4 Exch. 755.

(*y*) *Lewis v. Jones*, 4 B. & C. 506.

(*z*) *Harrhy v. Wall*, 1 B. & Ald. 103; S. C. 2 Stark. 198.

(*a*) *Britten v. Hughes*, 5 Bing. 460.

(*b*) *Holmes v. Love*, 3 B. & C. 242.

[Where certain of the creditors of a debtor signed an instrument in writing, by which they agreed to accept twenty-five per cent. in full discharge of their debts, provided all the other creditors assented to the arrangement, and provided the debtor furnished the requisite security within three months; and it appeared that one creditor

refused to sign the agreement, and subsequently collected his debt in full, but the plaintiff, who was a creditor, and signed the agreement, received from the debtor the requisite security, and gave a discharge of his claim; it was held, in the absence of all proof of fraud on the part of the debtor, that the plaintiff must be considered as having waived the condition in reference to the other creditors, and that the discharge given by him was a bar to an action upon his original claim. *Dauchy v. Goodrich*, 20 Vt. 127.]

for some time, and paid the creditors 10s. in the pound, tendered to the defendants, for execution by them, a conveyance of all their estate, containing a clause of release, to which the defendants objected as insufficient, and accordingly refused to execute the deed; and, the instrument not having been executed by all the creditors, a meeting, at which the defendants were called on to execute, was adjourned, that the signature of every creditor might be obtained: it was held, that the plaintiffs who, as creditors, were parties to the above agreement, could not sue for their original debt; at least till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. (*c*)

Again: where a creditor releases a debt by executing a composition deed, he thereby loses the right to retain a written instrument, deposited with him by the debtor as a security for such debt. (*d*) And if, in such a case, the debtor has previously accepted bills for the original debt, payable to the creditor or order, and the latter has negotiated such bills, it is his duty to take them up at maturity. (*e*)

Effect of, on securities held by creditor.

But where the adventurers in a mine were indebted to A. for money lent; and it appeared that A. had himself borrowed that money from certain bankers, on the security of a promissory note made and signed by seven of those adventurers, and of which he, A., was the payee: it was held that a composition deed executed by A., as a creditor of all the adventurers in the mine, in respect of the moneys so lent, did not operate as a release of his right of action on the promissory note, as against the seven who had signed it. (*f*)

Where there is an agreement, that the plaintiff shall receive a certain sum as a composition for his debt, and that, upon receiving it, he will execute a release; this agreement will not bar the plaintiff's action, unless it appear that the defendant offered to pay the composition to the plaintiff, or tendered the release to him for execution. (*g*) So, if bills be given for the amount of the composition, and there be a covenant not

Effect of non-payment of composition.

(*c*) *Tatlock v. Smith*, 6 Bing. 339; [*Perkins v. Lockwood*, 100 Mass. 249, 250.]

(*e*) *Mallalieu v. Hodgson*, 16 Q. B. 689; 20 L. J. Q. B. 339; *Hawley v. Beverley*, 6 M. & G. 221.

(*d*) *Cowper v. Green*, 7 M. & W. 633. Effect of proviso, containing a saving of remedies in favor of the creditors; *Squire v. Ford*, 20 L. J. Chanc. 308.

(*f*) *Lanyon v. Davey*, 11 M. & W. 218.

(*g*) *Rosslyn v. Muggeridge*, 16 M. & W. 181, 183; [*Perkins v. Lockwood*, 100 Mass. 249.]

to sue the debtor until default be made in payment of the bills; so soon as such default is made, the creditors will be remitted to their original rights. (*h*) But in *Reay v. White*, (*i*) which was an action against the defendants as acceptors of a bill of exchange for 1,039*l.*, it appeared, that the defendants owed the plaintiffs a balance of 321*l.*; that the defendants failed, and their creditors, amongst whom were the plaintiffs, agreed to take a composition of 5*s.* in the pound on their debts, by notes at four and eight months; that there was a dispute as to the balance due to the plaintiffs; and that they promised to adjust their account with one of the defendants, and said they would do as the other creditors did; that the defendants insisted for some time that 250*l.* 9*s.* 7*d.* was the balance due; but that the defendants' attorney afterwards called on the plaintiffs' attorney, and told him that the defendants were ready to pay the composition on 321*l.*, the sum really due; and that the plaintiffs' attorney refused, and said they must have the whole. No actual tender was made of the notes, or of cash for the amount of the composition; and it was held that, under the circumstances, a tender was not necessary, and that the plaintiffs could only recover the amount of the composition on the balance.

And a composition deed is not void, although one of two trustees appointed thereby refuse to execute it, and there be a proviso that both shall execute by a specified time. (*k*)

In general, a debt or security by simple contract is extinguished by a *specialty* security given for the same, if the remedy on the latter be coextensive with that which the creditor had upon the former. (*l*) Thus, if a bond or covenant by the debtor be taken for, or to secure a simple contract debt, the latter is merged in the former; because, in contemplation of law, the specialty is an instrument of a higher nature, and affords a better remedy than was given by the original demand. (*m*)

But if one of two makers of a joint and several promissory note,

(*h*) *Leake v. Young*, 5 E. & B. 955.

(*i*) 1 C. & M. 748.

(*k*) *Small v. Marwood*, 9 B. & C. 300; and see *Good v. Cheeseman*, 2 B. & Ad. 328.

(*l*) *Ansell v. Baker*, 15 Q. B. 20, 25; *Mowatt v. Lord Londesborough*, 3 E. & B. 307, 334; *Sharpe v. Gibbs*, 16 C. B. N. S. 527; per Bayley J. *Twopenny v. Young*,

3 B. & C. 208, 211; *Acton v. Symon*, Cro. Car. 415; Bac. Abr. Debt (G. 1), Obligation (A.), note; 1 Wms. Saund. 295 a; *Drake v. Mitchell*, 2 East, 258, 259; *Shack v. Anthony*, 1 M. & S. 575; *Soward v. Palmer*, 2 Moore, 277.

(*m*) And see further, *Norfolk Railway Company v. M'Namara*, 3 Exch. 628; *Price v. Moulton*, 10 C. B. 561.

give the holder a mortgage deed to secure the amount, with a covenant to pay it, the other maker is not thereby discharged; for the remedy on the specialty is not coextensive with the remedy on the note. (*n*)

Nor will the giving of a specialty for a simple contract debt or security operate as a merger, even in favor of a surety, if it appear on the face of the specialty, or from the nature of the transaction, that it was intended only as an *additional* or *collateral* security. (*n*¹) Thus, where B., being indebted to A., procured C. to join with him in giving a joint and several promissory note for the amount; and, having become further indebted, and being pressed by A. for further security, he afterwards by deed (which recited the debt and the note, and that a further security had been offered), assigned to A. all his goods as a *further* security, with a proviso that he should not be deprived of the possession of the property assigned, until after three days' notice; it was held, that this deed did not extinguish or suspend A.'s remedy against C. on the note. (*o*) And so, where a banker took from A. his customer, and B. his surety, a bond conditioned for the payment of all sums already advanced, or thereafter to be advanced to A.; it was held that the bond was evidently intended only as a collateral security; that there was, therefore, no merger; and that A. might be sued for the balance of his account, as on a simple contract debt. (*p*)

Unless it be merely collateral.

Again: if a *material alteration* be made in a specialty, or any other instrument containing words of contract, without the consent of the party contracting, this will discharge him from all liability thereon, whether such alteration were made by a party to the contract, or by a stranger. (*q*)

By materially altering a written instrument.

(*n*) *Ansell v. Baker*, 15 Q. B. 20.

(*n*¹) [*Collyer Part.* § 481; *Charles v. Scott*, 1 Serg. & Rawle, 294; *Banorjee v. Hovey*, 5 Mass. 11; *Sterling v. Rogers*, 25 Wend. 658. The deed of the surety does not extinguish the principal contract. *White v. Cuyler*, 6 T. R. 177. See *Banorjee v. Hovey*, 5 Mass. 20, 25; *Tarr v. Northey*, 17 Maine, 113.]

(*o*) *Twopenny v. Young*, 3 B. & C. 208; and see *Emes v. Widdowson*, 4 C. & P. 151.

(*p*) *Holmes v. Bell*, 3 M. & G. 213; 3 Scott N. R. 479.

(*q*) *Pigot's case*, 11 Co. 26 b; *Markham v. Gonaston*, Cro. El. 626; *Shep. Touch.* 68, 69; *Com. Dig. Fait (F. 1)*; *Davidson v. Cooper* (in error), 13 M. & W. 343, 352; *Mollett v. Wackerbarth*, 5 C. B. 181, 194; *Master v. Miller*, 4 T. R. 320; S. C. 5 T. R. 367; [*Adams v. Frye*, 3 Met. 103, 104; *Homer v. Wallis*, 11 Mass. 309; *Granite Railway Co. v. Bacon*, 15 Pick. 239; *Wheelock v. Freeman*, 13 Pick. 165; *Oakey v. Wilcox*, 3 How. (Miss.) 330; *Haines v. Dennett*, 11 N. H. 180; *King v. Hunt*, 13 Mis. 97. But see, as to an alteration by a stranger, *post*, 1168, note

And it is said, that where the alteration is made by a party to the contract, it operates as a discharge thereof upon this principle — that “no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected;” (*r*) and that where a stranger alters the instrument, it is avoided upon the ground, that the alteration may raise a doubt as to its identity. (*s*)

Therefore, where the broker of the vendor of goods — after the bargain had been completed by the delivery of the bought and sold notes to the respective parties, — at the instance of the vendor, but without the consent of the vendee, added a clause to the sale note, which was the only evidence of the contract; it was held, that the purchaser was discharged from his liability to accept the goods. (*t*)

(*g*); *Nichols v. Johnson*, 11 Conn. 192. The burden of proof is on the party alleging it to show the alteration. *Davis v. Jenney*, 1 Met. 221; *Miller v. Stewart*, 4 Wash. C. C. 26; *post*, 1163, note (*c*). If a written agreement, not under seal, be altered by the party claiming under it in a material part, he can never recover upon the agreement so altered, nor can he avail himself of the agreement in its original and true form; there is no distinction between *deeds* and other *written instruments* in this respect. *Newell v. Mayberry*, 3 Leigh, 250; *Mills v. Starr*, 2 Bailey, 359. See *Adams v. Frye*, 3 Met. 103; note (*t*) below. Where the subscribers to a petition for a highway, in which the particular courses between the two *termini* were expressly described, appointed an agent to take charge of the petition, agreeing to pay for his services and expenses, after which the petition was amended by striking out all the intermediate courses, and praying for the location of a road between the same *termini*, in such manner as the locating committee should deem expedient; it was held that such alteration absolved from the contract those petitioners whose private interests it might injuriously affect. *Jewett v. Hodgdon*, 3 Greenl. 103. See *Irvin v. Turnpike Co.* 2 Penn. 466. Where a petition for a road was altered after its signature, and one of the petitioners being sued for his proportion of the expense in-

curred in prosecuting it, claimed to be absolved from his contract on the ground of the alteration, it is for the jury to determine whether the alteration was material. *Jewett v. Conforth*, 3 Greenl. 107; *Patridge v. Ballard*, 2 Greenl. 50. If A. sign his name to a paper in blank, and verbally authorize B. to write over it a certain agreement, A. will be bound by such agreement when written. *Aliter*, if B. annex a seal to A.'s name, and deliver the instrument as a deed. *Warring v. Williams*, 8 Pick. 326. The addition of subscribing witnesses to a sealed instrument, without the consent of one of the parties, avoids it as to him. *Henning v. Werkheiser*, 8 Barr, 518.]

(*r*) Per Lord Kenyon, *Master v. Miller*, 4 T. R. 320, 329.

(*s*) See per Dallas C. J. *Sanderson v. Symonds*, 1 B. & B. 426, 430. It has been recently laid down that the strictness of the rule in *Pigot's* case can be explained, only on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state; and that the party who may suffer has no right to complain since there cannot be any alteration except through fraud or laches on his part; per Cur. *Davidson v. Cooper*, 13 M. & W. 343, 352.

(*t*) *Powell v. Divett*, 15 East, 92. [Where the vendee wilfully alters a bill of

So if a creditor take a bill of exchange from his debtor, drawn by the latter upon and accepted by a third person; and he afterwards, without consent, alters the instrument as to the time for payment; such alteration discharges the debtor from his liability even for the original debt. (*u*) But it is otherwise where the bill was accepted by the debtor himself; (*x*) at all events, unless it appear that the bill was indorsed after being altered, and that it is still outstanding. (*y*)

And the effect of a material alteration will be the same, although the original words of the instrument be still legible; (*z*) or although it be not made in respect of the duty, of the breach of which the plaintiff complains. (*a*)

And where an instrument bears marks of alterations or erasures, and the question as to the effect of these is properly raised on the record, (*b*) it is incumbent on the party who seeks to enforce such instrument, to show that the alteration does not invalidate it. (*c*)

sale for the purpose of covering property from execution, such altered instrument is not evidence in an action upon it by the vendee. *Babb v. Clemson*, 10 Serg. & R. 419. Where it is part of the plaintiff's own case that the instrument was altered, it cannot be received in evidence. *Ib.* See *Martendale v. Follett*, 1 N. H. 95; *Ilomer v. Wallis*, 11 Mass. 309; *Bracket v. Mountfort*, 2 Fairf. 115; *Stagg v. Pepoon*, 1 N. & M. 103; *Bowers v. Jewell*, 2 N. H. 543.] For cases in which alterations have been held to vitiate bills of exchange and promissory notes, see *Gardner v. Walsh*, 5 E. & B. 83; *Burchfield v. Moore*, 3 Ib. 683; *Bell v. Gardiner*, 4 M. & G. 11; 4 Scott N. R. 621; *Calvert v. Baker*, 4 M. & W. 417; *Crotty v. Hodges*, 4 M. & G. 561; *Perring v. Hone*, 4 Bing. 28; *Knight v. Clements*, 8 A. & E. 215. Case of a guaranty, see *Heming v. Trenery*, 9 A. & E. 926; *Davidson v. Cooper*, 13 M. & W. 343; of a policy of insurance, *Fairlie v. Christie*, 7 Taunt. 416; and *Sanderson v. Symonds*, 1 B. & B. 426.

(*u*) *Alderson v. Langdale*, 3 B. & Ald. 660; and see *Warrington v. Early*, 2 E. & B. 763; *Burchfield v. Moore*, 3 Ib. 683. [See *Newell v. Mayberry*, 3 Leigh, 250; *Whelock v. Freeman*, 13 Pick. 165; *Mills*

v. Starr, 2 Bailey, 359. So, the insertion of the words "or his order," in a note subsequent to delivery and without the maker's consent, renders the note invalid. *Bruce v. Westcott*, 3 Barb. 374.]

(*x*) *Atkinson v. Hawdon*, 2 A. & E. 628.

(*y*) *Ib.* 631.

(*z*) See cases cited, *supra*, note (*q*).

(*a*) *Mollett v. Wackerbarth*, 5 C. B. 181; and see per Maule J. *Ib.* 193.

(*b*) See *Sibley v. Fisher*, 7 A. & E. 444. As to the pleadings upon which the objection, that the contract has been altered, may be taken, *Cook v. Coxwell*, 2 Cr., M. & R. 291; *Parry v. Nicholson*, 13 M. & W. 778; *Mason v. Bradley*, 11 M. & W. 590.

(*c*) *Bul. N. P.* 255; 12 Vin. Abr. 58; *Singleton v. Butler*, 2 B. & P. 283; *Henman v. Dickinson*, 2 M. & P. 289; *Johnson v. Duke of Marlborough*, 2 Stark. 313; *Bishop v. Chambre, Moo. & M.* 116; overruled as to another point in *Jardine v. Paine*, 1 B. & Ad. 761; [*Stoner v. Ellis*, 6 Ind. 152. This has been very generally regarded as the rule in cases of promissory notes and bills of exchange. *Bishop v. Chambre, Moo. & M.* 116; *S. C.* 3 C. & P. 55; *Henman v. Dickinson*, 5 Bing. 183; *Knights v. Clements*, 3 Nev. & P. 375; *S.*

It is also laid down in Pigot's case, (*d*) that "if the obligee him-

C. 8 Ad. & El. 215; *Clifford v. Parker*, 2 M. & G. 909; *Simpson v. Stackhouse*, 9 Barr, 186; *Wilde v. Armsby*, 6 Cush. 317, per Metcalf J.; *Byles on Bills* (6th Eng. ed.), 258, 259; *Chitty on Bills* (12th Am. ed.), 189, and note; *Hills v. Barnes*, 11 N. H. 395; *Paine v. Edsell*, 19 Penn. St. 178; *Clark v. Eckstein*, 22 Penn. St. 507; *Huntington v. Finch*, 3 Ohio (N. S.), 445. Mr. Greenleaf thus states the rule in reference generally to written instruments: "If, on the production of the instrument, it appears to have been *altered*, it is *incumbent on the party offering it* in evidence to *explain* this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove." "But," he adds, "if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence." 1 Greenl. Ev. § 564. See *Mathews v. Coalter*, 9 Mis. 705. In *Hills v. Barnes*, 11 N. H. 395, which was the case of an evident alteration in the date of a promissory note, Mr. Chief Justice Parker said: "In the absence of all evidence, either from the appearance of the note itself, or otherwise, to show when the alteration was made, it must be presumed to have been made subsequent to the execution and delivery of the note. This rule is necessary for the security of the maker, who must otherwise take evidence of the appearance of the note when it is delivered, in order to protect himself against alterations subsequently made without his privity." In *Byles on Bills* (6th Eng. ed.), 258, 259, it is said: "The burden of explaining an alteration imposes no hardship on the plaintiff [the holder of

an altered bill]; for if the bill was altered while in his hands, he may and ought to account for it; if before, then he took it with a mark of suspicion on its face, which ought to have induced him either to refuse it, or to require evidence of the circumstances under which the alteration was made." Park J. in *Henman v. Dickinson*, 5 Bing. 183, said that good sense pointed out this rule, inasmuch as the defendant, who was the acceptor of the bill in suit, can have no means of knowing the circumstances of a subsequent alteration. This same view of the subject was taken by Gibson C. J. in *Simpson v. Stackhouse*, 9 Barr, 186. See *Walters v. Short*, 5 Gilman, 252; *Tillou v. Clinton & Essex Mut. Ins. Co.* 7 Barb. 564. This same rule has been applied in the case of a guaranty. *Wilde v. Armsby*, 6 Cush. 314, was an action on a written guaranty of the payments of George Winchester & Company, and it appeared, on the face of the instrument, the signature to which was admitted, that the same had been altered by an interlineation of the words "and Company," written in a different handwriting from that of the rest of the instrument, and in a different ink. It was held to be incumbent on the plaintiff to show that the interlineation was made before the instrument was executed. See *Hemming v. Trenery*, 9 Ad. & El. 926. It has also been applied in other cases of contracts. See *Walters v. Short*, 5 Gilman, 252; *Tillou v. Clinton & Essex Mut. Ins. Co.* 7 Barb. 564. In *Wilde v. Armsby*, *supra*, Metcalf J. said: "We are not prepared to decide that a material alteration, manifest on the face of the instrument, is, in all cases whatsoever, such a suspicious circumstance as throws the burden of proof on the party claiming under the instrument. The effect of such a rule of law would be, that if no evidence is given by a party claiming under such instrument, the issue must always be found against him; this being the meaning of 'burden of proof.'

self alter the deed, *although it is in words not material*, yet the deed is void." And so it is said, in Sheppard's Touchstone, (e) that "if the alteration be made by the party himself that owneth the deed, albeit it be in a place not

Immaterial alteration does not invalidate.

1 Curteis, 640. But we are of opinion, upon the authorities, English and American, and upon principle, that the burden of proof, in explanation of the instrument in suit in this case, was on the plaintiff. It was admitted by his counsel, at the argument, that the words 'and Co.,' which were interlined in the guaranty, were in a different handwriting from that of the rest of the instrument, and also in different ink. In such a case, the burden of explanation ought to be on the plaintiff; for such an alteration certainly throws suspicion on the instrument." In *M'Micken v. Beauchamp*, 2 Miller (Louis.), where a contract appeared to be altered in a material part *by different ink*, the court took the broad ground that writings erased or interlined are presumed to be false. See, also, *Jackson v. Jacoby*, 9 Cowen, 125; *Com. & Railroad Bank of Vicksburg v. Lum*, 7 How. (Miss.) 414. In *Bishop v. Chambre*, *supra*, the alteration was in a different handwriting, and with different ink. In *Wilde v. Armsby*, *supra*, Metcalf J. remarking further upon this subject, said: "The question, in the case of a simple contract, seems to have first arisen in England, in the year 1818, in *Johnson v. The Duke of Marlborough*, 2 Stark. 313, although cases of altered deeds had arisen long before. And it was said by the counsel for the plaintiff that it is an established rule of evidence, in England, in the case of deeds, that an alteration in them is presumed to be made before they were executed. But we have not examined that question; for we do not consider it of any importance in the present case. It may be remarked, however, that the suggested English rule, as to deeds, has more than once been disregarded by the courts in this country. The first case, so far as we know, in which this question of burden of

proof, or presumption, as to the alteration of instruments, arose in the United States, was in 1782, in *Morris v. Vanderen*, 1 Dallas, 64, where an altered deed was given in evidence, McLean C. J. said: 'An interlineation, if made after the execution of a deed, will avoid it; nor is it to be presumed to have been made before; the presumption is the contrary, unless otherwise proved.' And in *Jackson v. Osborn*, 2 Wend. 555, the supreme court of New York held, in a case of a deed, that when nothing appears but the fact of an erasure or an interlineation in a material part, of which no notice is taken at the time of execution, it is a suspicious circumstance which requires some explanation on the part of the plaintiff; thus applying to a deed the rule applied in England, and generally in this country, to a simple contract. See, also, *Jackson v. Jacoby*, 9 Cowen, 125; *Waring v. Smyth*, 2 Barb. Ch. R. 133; *Herrick v. Malin*, 22 Wend. 388; *Prevost v. Gratz*, Peters C. C. 369; *Davis v. Oliver*, 1 Ridgw. P. C. 15." In *Acker v. Ledyard*, 8 Barb. 514, the same rule was again asserted as that stated above in *Jackson v. Osborn*. But in *Tatham v. Catamore*, 20 L. J. Q. B. 364; S. C. *nom. Tatum v. Catamore*, 16 Q. B. 745, Lord Campbell said: "A deed cannot be altered after it is executed without fraud and wrong; and the presumption is against fraud or wrong." And in this case it was held that the presumption is that an erasure or interlineation in a deed was made at the time of the execution of the deed. See, also, *Beaman v. Russell*, 20 Vt. 205; 1 Greenl. Ev. § 564. In Coke Litt. 225 b, it is said, that "anciently, if a deed appeared to be razed or interlined in places material, the judges adjudged it to be void. But of later times the judges have left that to the juries to

material, and that it tend to the advantage of the other party, and his own disadvantage, yet the deed is hereby become void."

say whether the razing or interlining was before the delivery." In a note upon this passage, in Hargrave & Butler's edition of Coke upon Littleton, it is laid down that "the interlineation is to be presumed, if the contrary be not proved, to have been made at the time of making the deed." See, also, *Trowell v. Castle*, 1 Keb. 22; *Bailey v. Taylor*, 11 Conn. 534, per Williams C. J.; *Fitzgerald v. Fauconberg*, Fitzg. 207, 213; *Speake v. United States*, 9 Cranch, 37; *Wilkes v. Caulk*, 5 Harr. & J. 41; *Simpson v. Stackhouse*, 9 Barr, 186. The question as to the burden of proof to show and explain an alleged alteration in a note, by which the time of payment was extended, was raised in *Davis v. Jenney*, 1 Met. 221. The court there held that the burden of proof is on the defendant to show the alteration. And in that case, Mr. Chief Justice Shaw said: "The proof or admission of the signature of a party to an instrument is *prima facie* evidence that the instrument written over it is the act of the party; and this *prima facie* evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered." But on the question whether, in the absence of other evidence, the presumption would be that the alteration was made after the signature of the instrument, though raised and discussed, the court, stating its importance, gave no opinion. See, also, *Pullen v. Hutchinson*, 25 Maine, 254. In some cases it has been held that if the alteration is against the interest of the party deriving title from the instrument, as if it be a note altered to a less sum, the law does not so far presume that it was improperly made, as to throw on him the burden of accounting for it. See *Bailey v. Taylor*, 11 Conn. 531, where the whole subject is thoroughly discussed by Mr. Chief Justice Williams; *Den v. Farlee*, 1 Zab. 279; *Coulson v. Walton*, 9 Peters, 789; 1 Grecnl. Ev. § 564; *Bowers v. Jewell*, 2 N. H. 543; *Wilson v. Henderson*, 9 Sm. & M. 375. There are also many other cases which show that the rule above stated, that an alteration in an instrument by erasure, interlineation, &c., is presumed to have been made after execution, does not meet with universal assent. *Cumberland Bank v. Hall*, 1 Halst. 215; *Clark v. Rogers*, 2 Grecnl. 147; *Prevost v. Gratz*, 6 Wheat. 481, 502; *Heffelfinger v. Shute*, 16 Serg. & R. 47; *Cowen & Hill's notes to Phillips's Ev.* part 2, pages 299, 300; *Sayer v. Reynolds*, 2 South. 737; *Rankin v. Blackwell*, 2 John. Cas. 198, 200; *Davis v. Jenney*, 1 Met. 221; *Gooch v. Bryant*, 13 Maine, 390; *Beaman v. Russell*, 20 Vt. 205; *North River Meadow Co. v. Shrewsbury Church*, 2 N. Jer. 424; *Mathews v. Coalter*, 9 Mis. 705; *Finney v. Turner*, 10 Ib. 207; *Wilbur v. Wilbur*, 13 Met. 405. It seems to be properly a question for the jury whether the alteration was before or after the execution of an instrument, and whether made with or without the assent of the adverse party. *Cumberland Bank v. Hall*, 1 Halst. 215; *Bailey v. Taylor*, 11 Conn. 531; *Heffelfinger v. Shute*, 16 Serg. & R. 44; *Commissioners v. Hannion*, 1 Nott & McCord, 554; *Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Wilkes v. Caulk*, 5 Harr. & J. 36; *Smith v. Fenner*, 1 Gallis. 170; *Penny v. Corwithe*, 18 John. 499; *Fowle v. Smith*, argued and decided in Mass. Essex County, Nov. Term, S. J. C. 1836; *Nazro v. Fuller*, 24 Wend. 374; *Com. & Railroad Bank of Vicksburg v. Lum*, 7 How. (Miss.) 414; *Hills v. Barnes*, 11 N. H. 397; *Gooch v. Bryant*, 13 Maine, 390; *Beaman v. Russell*, 20 Vt. 205; *Smith v. McGowan*, 3 Barb. 404; *Acker v. Ledyard*, 8 Barb. 514; *Kimball v. Lawson*, 2 Vt. 138; *Hudson v. Reel*, 5 Barr, 279; *Wilson v. Henderson*, 9 Sm. & M. 375; *Porter v. Doby*, 2 Rich. Eq. 49; *Tillou v. Clinton & Essex Mut. Ins. Co.* 7 Barb. 564; *Pullen v. Hutchinson*, 25 Maine,

But the court of queen's bench, in a recent case, expressly dissented from this doctrine; and held that a promissory note, which did not express any time for payment, but to which, while it was

249; *Tatham v. Catamore*, 5 Eng. Law & Eq. Rep. 349; *Stoner v. Ellis*, 6 Ind. 152. In *Beaman v. Russell*, 20 Vt. 205, it was held that the court, upon the usual proof of the execution of the instrument, should admit it in evidence, without reference to the character of any alterations upon it, leaving all testimony in relation to such alteration to be given to the jury, and passed upon by them, under proper instructions from the court, upon any given state of facts. The nature and amount of evidence necessary to warrant a jury in finding that the alteration was made under such circumstances as not to vitiate the instrument, will depend upon the nature of the alteration, and the facts of each case. See *Carriss v. Tattersall*, 2 M. & Gr. 890; *Whitfield v. Collingwood*, 1 C. & K. 325; *Wilde v. Armsby*, 6 Cush. 318; *Wilson v. Henderson*, 9 Sm. & M. 375. In some cases it has been left to the jury to decide upon the character and effect of the alteration from an inspection of the instrument itself. See *Bishop v. Chambre*, 3 C. & P. 55; *Taylor v. Mosely*, 6 C. & P. 273; *Beaman v. Russell*, 20 Vt. 205; *Hills v. Barnes*, 11 N. H. 395, 397; *Gooch v. Bryant*, 13 Maine, 390. In *Crabtree v. Clark*, 20 Maine, 337, it was held that where the note in suit appears, from inspection, to have been altered, and the jury are of opinion that the alteration was made after the execution of the note, it will be their duty to return their verdict for the defendant. But whether altered subsequently or not, is a question for the jury, if no explanatory testimony is introduced. The jury are not to be instructed, as matter of law, that if not accounted for by the plaintiff, the note is void. If the note is written partly by one hand and finished by another, with different ink, this does not furnish *prima facie* evidence that the note was fraudulently altered. So, it has been held that the fact that a deed is written in two different kinds of ink, or that

the grantee's name is written over on the erasure of another name, is not sufficient to exclude the deed as evidence, nor is it *prima facie* evidence of an alteration, but the question may be left to the jury, and these circumstances may be explained by the party offering the deed, either before or after it is read. *Smith v. McGowan*, 3 Barb. 404. See *M'Micken v. Beauchamp*, and *Wilde v. Armsby*, *supra*; *Knights v. Clements*, 8 Ad. & El. 215. A material alteration in a deed of land, while in the possession of the grantee, is *prima facie* fraudulent, and is presumed to have been made by the grantee himself. *Chesley v. Frost*, 1 N. H. 145. Such alteration does not divest a title once fixed. *Chessman v. Whittemore*, 23 Pick. 231; *Hatch v. Hatch*, 9 Mass. 307, 311; *Davidson v. Cooper*, 11 M. & W. 800; *Burrett v. Thorndike*, 1 Greenl. 73; *Withers v. Atkinson*, 1 Watts, 236; *Smith v. McGowan*, 3 Barb. 404. But it avoids the deed so far, that no action can be sustained upon it. *Waring v. Smyth*, 2 Barb. 114; *Agriculturist &c. Co. v. Fitzgerald*, 4 Eng. Law & Eq. R. 211; *Wallace v. Harmstad*, 15 Penn. St. 462; *Davidson v. Cooper*, 11 M. & W. 800; *Withers v. Atkinson*, 1 Watts, 236; *Chessman v. Whittemore*, 23 Pick. 231; *Bliss v. McIntire*, 18 Vt. 466. For other cases affecting the point stated in the text, see *Warren v. Layton*, 3 Harr. 404; *Davis v. Carlisle*, 6 Ala. 707; *Reunion v. Crane*, 4 Blackf. 466; *Pullen v. Shaw*, 3 Dev. 238; *Humphreys v. Gwillow*, 13 N. H. 385; *Ranken v. Blackwell*, 2 John. Cas. 198; *Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Tedlie v. Dill*, 2 Kelly, 128. In reference to alterations by erasures and interlineations in a will, see *Wikoff's Appeal*, 15 Penn. St. 281; *Tatham v. Catamore*, 20 L. J. Q. B. 364; *S. C. nom. Tatum v. Catamore*, 16 Q. B. 745, per Lord Campbell C. J.; *Shallcross v. Palmer*, 16 Q. B. 747.]

in the possession of the payee, he had added, without the assent of the maker, the words "on demand," was not thereby vitiated; inasmuch as the alteration only expressed the legal effect of the note as originally framed, and was therefore immaterial. (*f*)

And, *à fortiori*, an alteration by a stranger, if made without the privity or default of a party interested, and in an immaterial particular, will not vitiate the instrument. (*g*)

Therefore, where a bond was conditioned to pay 100*l.*, by six equal payments of 16*l.* 13*s.* 4*d.*, on the 3d of October in every year, "until the full sum of *one pound* was paid;" and a *stranger* inserted the word *hundred* between "one" and "pound;" the court held that, as it was manifestly intended that the condition should be for the payment of 100*l.*, by six yearly instalments of

(*f*) *Aldous v. Cornwell*, L. R. 3 Q. B. 573. [See *Lewis v. Paine*, 8 Cowen, 71. It has been held that a written instrument is not rendered void by an alteration, which does not vary its meaning, though made by a party claiming under it. *Nichols v. Johnson*, 10 Conn. 192. But see *Nunnery v. Cotton*, 1 Hawks, 222. An alteration in the date of an assignment of a note, does not affect the assignee's claim on the maker. *Griffith v. Cox*, 1 Overton, 210. Nor the addition of a date to an indorsement of a partial payment. *Howe v. Thompson*, 2 Fairf. 152. An alteration of a written promise, by the insertion of a word which the law would supply, will not annul the contract, although it be interlined by the promisee without consent. *Hunt v. Adams*, 6 Mass. 519. See *Smith v. Crooker*, 5 Mass. 538; *Hatch v. Hatch*, 9 Mass. 307; *State v. Cilley*, 1 N. H. 97. An instrument from which the signature or seal has been taken off, whether it were done by the obligor or a stranger, by accident or design, cannot be declared on as a deed with a *proferit in curiam*; but the facts must be stated as a reason or excuse for not making a *proferit*. *Powers v. Ware*, 2 Pick. 451. See 1 Metcalf & Perkins' Dig. 141, 142, tit. Alteration of Instruments. And it seems now to be generally agreed, that an immaterial alteration will not avoid a contract by whomsoever such alteration may be made. See *Falmouth v.*

Roberts, 9 M. & W. 469; *Pequawket Bridge v. Mather*, 8 N. H. 139; *Blair v. Bank of Tennessee*, 11 Humph. 84; *Skelton v. Deering*, 10 B. Monroe, 405; *Adams v. Frye*, 3 Met. 104. See *Wright v. Wright*, 2 Halst. 175; *Wilkes v. Caulk*, 5 Harr. & J. 36; *Starr v. Lyon*, 5 Conn. 540; *Langdon v. Paul*, 20 Vt. 217.]

(*g*) *Pigot's case*, 11 Co. 27 a; *Shep. Touch.* 68, 69. [It has been held, in several cases in the United States, that an alteration by a stranger, though material, will not render the instrument inoperative. *Nichols v. Johnson*, 10 Conn. 192; *Boyd v. McConnell*, 10 Humph. 68; *Lee v. Alexander*, 9 B. Mon. 25; even if made with the consent of the party claiming under the instrument, provided there be no intent to defraud; *Thornton v. Appleton*, 29 Maine, 298; *Adams v. Frye*, 3 Met. 103; *Smith v. Dunham*, 8 Pick. 246; *Marshall v. Gougler*, 10 Serg. & R. 164; *Willard v. Clark*, 7 Met. 435; *Rollins v. Bartlett*, 20 Maine, 319; where the original contents of the instrument can be ascertained; *Waring v. Smyth*, 2 Barb. Ch. R. 119; or can be proved. *Boyd v. McConnell*, 10 Humph. 68. Whether an alteration is material is a question of law, and it seems to be error for the court to leave that question to the jury. *Stephens v. Graham*, 7 Serg. & R. 508; *Bowers v. Jewell*, 2 N. H. 543; *Steele v. Spencer*, 1 Peters, 552.]

16*l.* 13*s.* 4*d.*, the insertion of the word *hundred* did not alter the sense, and therefore did not destroy the bond. (*h*)

So, in another case, (*i*) the court held that the alteration of an award by a stranger in a part not material, did not invalidate the instrument.

So, in *Argoll v. Cheney*, (*k*) a deed from which the seal had been torn was held good, it appearing that the seal was torn off by a little boy.

Nor does the *cancellation*, (*l*) *loss*, or *destruction*, (*m*) of an instrument by *mistake or accident*, even by a party interested, in general free the other contracting party from liability thereon. (*n*)

Effect of
cancellation,
&c., by mis-
take.

Lastly: if parties enter into an agreement, and, before any breach thereof, they enter into a new agreement varying the former in an essential particular, such substituted contract may be pleaded in answer to an action on the original agreement. (*o*)

Substituted
contract.

6. Another Action pending—Judgment recovered.

1. The mere *pendency* of an action for the recovery of a debt or damages, does not operate as an *extinguishment* of the contract upon which the right to such debt or damages is founded. (*p*) But the law abhors multiplicity of actions, and declares that a man is not to be twice vexed for the same cause. (*q*) And, accordingly, where a second suit for

Pendency of
another ac-
tion may be
pleaded in
abatement.

(*h*) *Waugh v. Russell*, 5 Taunt. 707. See *Sanderson v. Symonds*, 1 B. & B. 426; [*Boyd v. Brotherson*, 10 Wend. 93. And in such case, the question as to the sum intended to be inserted is properly submitted to the jury. *Boyd v. Brotherson*, *supra*.]

(*i*) *Trew v. Burton*, 1 C. & M. 533, 535; and see *Hentree v. Bromley*, 6 East, 309.

(*k*) Palm. 402, 403. [See *Powers v. Ware*, 2 Pick. 451, 458-460.]

(*l*) *Raper v. Birbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 757.

(*m*) *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259; *Read v. Brookman*, 3 T. R. 151; *Totty v. Nesbitt*, 3 T. R. 153, note (*c*).

(*n*) A party to a negotiable bill or note cannot sue thereon, at law, without pro-

ducing it at the trial, unless there be an order to that effect, under the 17 & 18 Vict. c. 125, s. 87. *Ramuz v. Crowe*, 1 Exch. 167; *Wain v. Bailey*, 10 A. & E. 16.

(*o*) Per Cur. *Taylor v. Hillary*, 1 Cr. M. & R. 741, 743.

(*p*) *Harley v. Greenwood*, 5 B. & Ald. 101.

(*q*) Hob. 137; *Rawlinson v. Oriel*, Carth. 96. By the 23 & 24 Vict. c. 126, s. 19, it is enacted that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the names of all the persons, in whom the legal right may be supposed to exist; and by s. 21 it is enacted, that no other action shall be brought against the defendant by any person so joined as plaintiff, in respect of the same cause of action.

the same cause is instituted, the *pendency* of the former suit may be pleaded in *abatement* thereof. (r) And if both actions are brought in the courts at Westminster, this will be a good plea, whether the first action be in another, or in the same court. (r)

In order, however, to make this a good plea, it must appear that the cause of action is, in both cases, identical. And, therefore, where to an action by the assignees of a bankrupt for goods sold by the bankrupt, alleging promises made to him before his bankruptcy, and also on an account stated with the plaintiffs as assignees, the defendant pleaded the pendency of a former action brought by the bankrupt upon the same promises, before his bankruptcy; this was held to be a bad plea. (s) And, again, as the principle of this plea is, that the *same party* is not to be twice harassed for the same cause, it is held that, in an action on a contract against A., he cannot plead in abatement the pendency of another action for the same cause against B. (t)

Nor, where the defendant has nonprossed the plaintiff in the former action, can he plead the pendency of that action to another action for the same cause. (u)

And the pendency of a suit in a *foreign* court, (x) or in an *inferior* court, cannot be pleaded to an action in one of the courts at Westminster, for the recovery of the same demand. (y)

Aliter, where action pending in a foreign or inferior court.

(r) Com. Dig. Abatement (H. 24); Bac. Abr. Abatement (M.); [Parker v. Colcord, 2 N. H. 36; Tracy v. Reed, 4 Blackf. 56; James v. Dowell, 7 Sm. & M. 333; Marble v. Keyes, case of tort.]

(s) Biggs v. Cox, 4 B. & C. 920.

(t) Henry v. Goldney, 15 M. & W. 494; [Casey v. Harrison, 2 Dev. 244. See Davis v. Hunt, 2 Bailey, 412; Thomas v. Freelon, 17 Vt. 138. Nor can the defendant plead the pendency of another action by the plaintiff, in which he sues in a different capacity. Cornelius v. Vancarsdallen, 2 Penn. St. 434. Nor where the parties stand in the reverse relation in the former suit. See Colt v. Partridge, 7 Met. 570; Haskins v. Lombard, 16 Maine, 140; Wadleigh v. Veazie, 3 Sumner, 165.] As to when the court will stay the proceedings in a second, owing to the pendency of a former action, see Haigh v. Paris, 16 M.

& W. 144; Sowter v. Dunston, 1 M. & R. 508.

(u) Pepper v. Whalley, 3 Dowl. 579.

(x) Cox v. Mitchell, 7 C. B. N. S. 55. This is no ground even for a stay of proceedings. Ib.

(y) Laughton v. Taylor, 6 M. & W. 695; Com. Dig. Abatement (H. 24). [It does not appear that any such distinction has been observed in the United States. It would doubtless here be a good cause of abatement, that a former action was pending for the same cause, although in an inferior tribunal, where the inferior tribunal had full jurisdiction of the parties and the subject-matter. See Thomas v. Freelon, 17 Vt. 138; Slyhoof v. Flitercraft, 1 Ash. 171; Boswell v. Tunnell, 10 Ala. 958; Johnston v. Bower, 4 Hen. & Munf. 487; Perley J. in Smith v. The Atlantic Mut. Fire Ins. Co. 22 N. H. 21. The pendency

2. When a *judgment* has been already obtained, in a prior action by the plaintiff against the defendant, for the identical demand, *transit in rem judicatam*; the cause of action is changed into matter of record, and the inferior remedy is merged in the higher. (z) In such a case, therefore, the creditor can no longer sue upon the original promise or demand, even although it accrued upon a specialty; and if he do so, the defendant may plead in bar, that the plaintiff has already *recovered judgment* against him for the same cause of action. (a)

When judgment recovered may be pleaded in bar.

So, judgment recovered in a county court is a good plea in bar to the same cause of action. (b)

of a former action in a *foreign* tribunal, unless it be a trustee process, is not a good cause of abatement; and in this respect the several states are *foreign* to each other. See *Bowne v. Joy*, 9 John. 221; *Salmon v. Wooton*, 9 Dana, 422; *Chatzel v. Bolton*, 3 McCord, 33; *Walsh v. Durkin*, 12 John. 99; *Embree v. Hanna*, 5 John. 101; *McJilton v. Love*, 13 Ill. 486; *Story Conf. Laws*, § 610 a; *Newell v. Newton*, 10 Pick. 470; *Trenton Bank v. Wallace*, 4 Halst. 83; *Smith v. The Atlantic Mut. Fire Ins. Co.* *supra*.]

(z) Per Cur. *King v. Hoare*, 13 M. & W. 494, 504.

(a) *King v. Hoare*, 13 M. & W. 494. See, also, *Todd v. Stewart*, 9 Q. B. 759; S. C. (in error) *Ib.* 767; per Bayley B. in *Siddall v. Rawcliff*, 1 C. & M. 490. [An indorsee of a note was sued by the holder, and judgment obtained against him for \$917, on account of which he paid \$330, to the holder, and then brought an action for money paid against his indorser, and recovered that amount. He then subsequently made further payments on account of the judgment against him, amounting to \$378, and again sued his indorser in an action for money paid to his use for the latter amount; and it was held, that such a suit would lie for every payment made with a *bonâ fide* intent of reducing the debt, and that the former recovery was no bar to the second action for the subsequent payment, although the evidence in both actions was, in fact, the same, viz.; the proof of the liability of the defendant as

indorser, the former recovery not having been upon the note, but for money paid. *Butler v. Wright*, 2 Wend. 369; S. C. 6 *Ib.* 284, in the court of errors.] This defence should now be pleaded specially. Plea of service of notice of an order for attachment, under 17 & 18 Vict. c. 125, s. 61, *Lockwood v. Nash*, 18 C. B. 536. Plea, that in a former action defendant paid a sum into court, with costs, in satisfaction; *Power v. Butcher*, 10 B. & C. 329. A cognovit for part only of a larger sum due, secured by a promissory note, and a receipt for debt and costs, bar a second action on the note. See *Siddall v. Rawcliff*, *supra*. And if the cause of action in two suits were identical, a judgment recovered was always held to be a defence, although the forms of action might be different; *Rontledge v. Hislop*, 2 E. & E. 549; *Slade's case*, 4 Co. 94 b; *Com. Dig. Action (K. 3)*: *Thrustout v. Crafter*, 2 Bl. 827; *Phillips v. Berryman*, 3 Dougl. 286; [*King v. Chace*, 15 N. H. 9; *Doty v. Brown*, 4 Comst. 71; *Agnew v. McElroy*, 10 Sm. & M. 552; *Young v. Black*, 7 Cranch, 565; *Pinney v. Barnes*, 17 Conn. 420. Where either of two or more persons may recover for a certain matter in controversy, judgment obtained by one will be a bar to a suit by another. *Green v. Clark*, 5 Denio, 497. So, where either of two or more persons may be sued, a recovery against one will bar a suit against the other. *King v. Chace*, 15 N. H. 9.] But this rule is now of little importance.

(b) *Austin v. Mills*, 9 Exch. 288.

And so, if the plaintiff has sued the defendant in the county court, and, in order to bring the case within the jurisdiction of that court, has abandoned part of his claim; judgment recovered in that suit will be a bar to any action which he may bring to recover the part so abandoned. (c)

[The same rule applies to other cases, where the creditor has chosen to compel payment of a part of his claim by process of law; this will, in general, where the claim consists of an entire demand, operate as an extinguishment of the whole, upon the principle, that a creditor shall not split up and divide an entire cause of action so as to maintain two suits upon it. (c¹)]

(c) *Vines v. Arnold*, 8 C. B. 632. [See *Merrick v. Dawson*, 2 Harring. 50; *Ex parte Gale*, R. M. Charl. 214; *Planters' & Merch. Bank v. Chipley*, 1 Geo. 50.]

(c¹) [*Ingraham v. Hall*, 11 Serg. & R. 78; *Crips v. Talvande*, 4 McCord, 20; *Smith v. Jones*, 15 John. 229; *Willard v. Sperry*, 16 John. 121; *Avery v. Fitch*, 4 Conn. 362; *Farrington v. Payne*, 15 John. 432; *Colvin v. Corwin*, 15 Wend. 557; *Vance v. Lancaster*, 3 Hayw. 130; *Badger v. Titcomb*, 15 Pick. 409, 413; *Pinney v. Barnes*, 17 Conn. 420; *Marble v. Keyes*, 9 Gray, 221. The rule stated in the text must be limited to cases where the claim is single and entire. *Phillips v. Berick*, 16 John. 136. Where a party has a demand for three tons of hay, delivered in pursuance of one entire contract, and he sues and recovers judgment for one ton, he cannot bring a suit for the remainder, but loses it. *Miller v. Covert*, 1 Wend. 487. So, where labor has been performed at various times, under the same entire contract, and there is a recovery in one suit upon such contract, the party cannot maintain a second action, even upon clear proof that no evidence was given in the first, as to the part of the demand in controversy. *Logan v. Caffrey*, 30 Penn. St. 196; *Hess v. Hebble*, 6 Serg. & R. 57; *Carvill v. Garrigues*, 5 Barr. 152; *Miller v. Manice*, 6 Hill, 122. But see *Hill v. Rewee*, 11 Met. 268, 272. A contract to do several things at several times, is divisible in its nature, and an action of assumpsit lies upon every default. *Badger v. Titcomb*, 15 Pick. 409. Although the

agreement is entire the performance is several. 15 Pick. 413. So, a running account for goods sold, &c., at different times, is not an entire demand incapable of being divided for the purpose of bringing several suits, unless there be an agreement to that effect. *Badger v. Titcomb*, *supra*; *Secor v. Sturgis*, 2 Hill (N. Y.), 548. See *Perry v. Harrington*, 2 Met. 368. The contrary was, however, held, in *Bendernagle v. Cocks*, 19 Wend. 207; *Guernsey v. Carver*, 8 Wend. 492. See *Stevens v. Lockwood*, 13 Wend. 644; *Colvin v. Corwin*, 15 Wend. 557; *Lane v. Cook*, 3 Day, 255; *Avery v. Fitch*, 4 Conn. 362. In *Badger v. Titcomb*, *supra*, it was held, that, if the items claimed in the second suit could have been proved in the former, the presumption is that they were so proved; but this presumption may be rebutted. See *Webster v. Lee*, 5 Mass. 334; *Golightly v. Jellicoe*, 4 T. R. 147, note; *Seddon v. Tutop*, 6 T. R. 607; *Bonsey v. Wordsworth*, 18 C. B. 325. Where a note or other contract is payable by instalments, an action lies to recover each as it falls due; or where interest is payable annually, the payment of the principal being postponed to a future time, an action lies for the non-payment of interest, before the principal becomes due and payable. *Wilde J. in Badger v. Titcomb*, 15 Pick. 413; *Hleywood v. Perrin*, 10 Pick. 228, 231; *Greenleaf v. Kellogg*, 2 Mass. 568; *Hastings v. Wiswal*, 8 Mass. 455; *Tucker v. Randall*, 2 Mass. 283. A second action of assumpsit will lie by the second indorser against the first indorser of

But, to a plea of judgment recovered in an inferior court, it is a good answer, that the cause of action was one over which that court had no jurisdiction. (*d*)

Again : a judgment, even without satisfaction, recovered against one of two *joint* debtors, is a good bar to an action against the other. (*e*)

So, where the declaration in the first action was framed so as to admit of evidence of debts then existing, but which are sought to be recovered in the second action, and the defendant suffered judgment by default in the first action, it will be *presumed* against the plaintiff, that he recovered such debts therein. (*f*) And where a precise issue is joined between the parties, and found by the jury, the judgment thereon will be a bar to a second action for the same cause, although the party against whom the issue was joined, offered no evidence in support thereof at the trial of the former action. (*g*)

a note for moneys paid on account of the note after a *former* action and recovery for moneys previously paid ; and such action may be maintained before the taking up and final payment of the note, and while it remains in the hands of a third person as the legal holder. *Wright v. Butler*, 6 Wend. 284. As this case then stood, the former recovery for the amount of moneys paid at the commencement of the first suit, was no bar to an action for moneys subsequently paid on the same account, upon the ground that this was a splitting of the demand ; the former recovery being as for so much money paid *at the request* of the defendant, *implied* from his legal liability to indemnify the plaintiff. *Wright v. Butler*, 6 Wend. 284. The rule that an entire cause of action shall not be made the ground of several distinct suits, applies to torts as well as to contracts. Thus, where a tort is committed as to several chattels, by a single indivisible act, the claim for damages cannot be split and a several action brought for each chattel ; a recovery for one part is a bar to an action for another part. *Farrington v. Payne*, 15 John. 432 ; *Phillips v. Berick*, 16 John. 136 ; *Hite v. Long*, 6 Rand. 457 ; *Marble v. Keyes*, 9 Gray, 221.

(*d*) *Briscoe v. Stephens*, 2 Bing. 213.

(*e*) *King v. Hoare*, 13 M. & W. 494, 504 ; *Buckland v. Johnson*, 15 C. B. 145. [See *Rice v. King*, 7 John. 20 ; *Johnson v. Smith*, 8 John. 383 ; *Price v. Boyd*, 1 Dana, 434 ; *Cutler v. Cox*, 2 Blackf. 178 ; *Livermore v. Hershell*, 3 Pick. 33 ; *Jones v. M'Neil*, 2 Bailey, 466, 477 ; *Belch v. Hallowman*, 2 Hayw. 328 ; *Jones v. Scriven*, 8 John. 453 ; *Cist v. Leigler*, 16 Serg. & R. 283. *Former recovery* for the same debt may be pleaded by partners, though the recovery was against *one* only. *Collyer Partn.* § 755 ; *Ward v. Johnson*, 13 Mass. 148. So, a judgment against one on joint debt merges the demand, and bars action against the other. *Collyer Partn.* 757, and note. And this is so, although the latter was a *dormant partner*, and not known to be liable when first action brought. *Ib.* § 757, and note. It is otherwise, however, where the former judgment or recovery was had against one of several *jointly and severally* liable. *Ib.* § 757, and note.]

(*f*) *Lord Bagot v. Williams*, 3 B. & C. 235.

(*g*) *Eastmure v. Lawes*, 7 Scott, 461, 471 ; *Outram v. Morewood*, 3 East, 346 ; but see *Seddon v. Tutop*, 6 T. R. 607.

So, judgment recovered in a consular court, established under the 6 & 7 Vict. c. 94, and *payment of the sum recovered*, is a good bar to the same cause of action. (*h*)

And it has been held that, if judgment be recovered in a foreign country, by the assignee of a debt, where, by the law of that country, the assignee may sue for the debt in his own name, such judgment will be a good bar to an action brought in this country for the same debt, at the suit of the original creditor. (*i*)

3. But in general, a judgment in a foreign or colonial court is not, *per se*, pleadable in bar of an action, brought by the same plaintiff for the same cause, in the courts of this country; (*k*) at least, unless the plea also show, that such judgment is final and conclusive in the place where it was pronounced. (*l*)

So, if it appear that the plaintiff could not recover full compensation on the record in the former action, a verdict and judgment in such action, will be no bar to a second action for the same cause. (*m*) Thus, in *Hadley v. Green*, (*n*) it appeared, that a landlord sued his tenant for rent and on the money counts, and gave particulars on the count for money had and received, for the value of a quantity of stone which was alleged to have been quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of the rent only; and he afterwards brought an action against the defendant for quarrying and carrying away the same stone; and it was held, that the recovery in the first action was no bar to the plaintiff's right to recover in the second; because, on the count for money had and received, he could not recover full compensation for the wrong complained of. (*o*) And so it has been held, that the fact of the plaintiff having — in an action brought against him by the defendant, to recover a sum agreed to be paid for the manufacture of a specific chattel — given evidence of a breach of the defendant's contract in reduction of damages; does not preclude him, the plaintiff, from afterwards suing the defendant, to recover

(*h*) *Barber v. Lamb*, 8 C. B. N. S. 95. recognizing *Plummer v. Woodburne*, 4 B.

(*i*) *Thompson v. Bell*, 3 E. & B. 236. & C. 625.

(*k*) *Bank of Australasia v. Harding*, 9 C. B. 661; and see *Same v. Nias*, 16 Q. B. 717; (*m*) *Florence v. Jennings*, 2 C. B. N. S. 454.

Smith v. Nicholls, 7 Scott, 147. (*n*) 2 C. & J. 374.

(*l*) *Smith v. Nicholls*, 7 Scott, 147, 169, (*o*) Per Lord Lyndhurst, 2 C. & J. 375.

against him for his breach of that contract, such damages as could not have been allowed in the former action. (*p*)

So, if it appear that the ground of the former verdict was, that the action was prematurely brought, — as in the case of an action brought for the price of goods, before the credit has expired, — such verdict will not prevent a recovery in a subsequent action for the same cause, which is brought in due time. (*q*)

And so, where the plaintiff recovers only *nominal* damages in the first suit, by reason of a technical objection precluding inquiry as to the amount due, a second action is not barred. Therefore where, in an action on contract, which was improperly brought against an administratrix, she pleaded in abatement that others were jointly liable, but failed to prove her plea; and the plaintiff, in consequence thereof, recovered a verdict, with 1s. damages; it was held, that such verdict did not bar the plaintiff from recovering against the other contractors. (*r*)

So where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered; it was held, in an action of covenant against the three, that such judgment was no defence; for though it was stated in the plea that the bill was *given* in payment and satisfaction of the debt, it was not averred that it had been *accepted* in satisfaction, or that it had, in fact, produced it. (*s*)

And a judgment recovered against one of two *joint and several* debtors, is no bar to an action against the other, unless such judgment has been satisfied. (*t*)

If the plaintiff has previously sued the defendant upon the same supposed causes of action, and judgment has been given *for the defendant* in that suit, the plaintiff cannot have a second action for the same cause; (*u*) and, in such case, the former judgment operates against the plaintiff as an *estoppel*. (*x*)

Effect of
judgment for
defendant.

(*p*) *Mondel v. Steel*, 8 M. & W. 858; and see *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

(*q*) *Palmer v. Temple*, 9 A. & E. 508, 521.

(*r*) *Godson v. Smith*, 2 Moore, 157; *Ferrers v. Arden*, Cro. El. 668; 2 Wms. Saund. 47; *Lechmere v. Fletcher*, 1 C. & M. 623.

(*s*) *Drake v. Mitchell*, 3 East, 254.

(*t*) *King v. Hoare*, 15 M. & W. 494; *Lechmere v. Fletcher*, 1 C. & M. 623, 635.

(*u*) *Overton v. Harvey*, 9 C. B. 324, 337; and see Vin. Abr. tit. Judgment (Q. 4); *Lampen v. Kedgewin*, 1 Mod. 207.

(*x*) *Vooght v. Winch*, 2 B. & Ald. 662. [The former verdict is conclusive only as to the facts directly and distinctly put in

So, where a verdict passes against a defendant upon a plea of set-off, he is estopped from setting up the same demand in a fresh action. (y)

Judgment for one of several joint debtors. But judgment recovered by one of several joint debtors, is not a defence to a subsequent action against the others, unless it be shown that the judgment was recovered on a ground which operated as a discharge of all. (z)

issue, and the finding of which must have been necessary to uphold the verdict. *Spooner v. Davis*, 7 Pick. 147; *Smith v. Sherwood*, 4 Conn. 276; *Dennison v. Hyde*, 6 Conn. 508; *Hopkins v. Lee*, 6 Wheaton, 109; *Gilbert v. Thompson*, 9 Cush. 348. See *Tyler v. Hammond*, 11 Pick. 193; *Blake v. Clark*, 6 Greenl. 436; *Shafer v. Stonebraker*, 4 Gill & J. 356; 2 Phil. Ev. (Cowen & Hill's notes), pt. 2, p. 826; *Bigelow Estoppel*, 83 *et seq.* The full advantage of such verdict can, however, in general be derived only from pleading it. Because, if a matter, be expressly affirmed or denied by one party, and the other intends to meet it by a former verdict on the same matter, he may offer that verdict to the court, and it shall be a conclusive bar. But if he chooses to submit the former verdict in evidence to the jury, they may weigh it as they weigh other evidence, and they are not estopped to find the truth against it. *Howard v. Mitchell*, 14 Mass. 241; per *Bigelow J.* in *Gilbert v. Thompson*, 9 Cush. 349; *Trevivian v. Lawrence*, 1 Salk. 277; *Wood v. Jackson*, 8 Wend. 1; *Jackson v. Wood*, 3 Wend. 27; *Church v. Leavenworth*, 4 Day, 274; *Canaan v. Green Woods Turnpike*, 1 Conn. 1; *Edwards v. M'Connell*, 1 Cooke, 305; *Towns v. Nims*, 5 N. H. 259; 1 Stark. Ev. (5th Am. ed.) 200, 201; 2 Ib. 206; *Wright v. Butler*, 6 Wend. 288, 289; *Vooght v. Winch*, 2 B. & Ald. 662; *Speake v. Richards*, Hob. 206, 207; *Outram v. Morewood*, 3 East, 365; *Shafer v. Stonebraker*, 4 Gill & J. 359. *Contra*, *Duchess of Kingston's case*, 11 St. Tr. 261; *Bird v. Randall*, 3 Burr. 1345. See, also, *Cist v. Leigler*, 16 Serg. & R. 282, 285; *Kilheffer v. Herr*, 17 Serg. & R. 319, 322; *Marsh v.*

Pier, 4 Rawle, 273; *Cleaton v. Chambliss*, 6 Rand. 86, 94; *Picquet v. M'Kay*, 2 Blackf. 465; *Estill v. Taul*, 2 Yerger, 467; *Betts v. Starr*, 5 Conn. 550; *Cowen & Hill's notes to Phil. Ev.* pt. 2, p. 804 *et seq.*, note 558 to page 322. But where the assurance and title to property are founded on the verdict, and the party has no opportunity of pleading it, the jury cannot find against it. *Adams v. Barnes*, 17 Mass. 365; *Howard v. Mitchell*, 14 Mass. 241; *Commonwealth v. Pejepsicut Proprietors*, 10 Mass. 155; *Trevivian v. Lawrence*, 1 Salk. 277; *Jackson v. Wood*, 8 Wend. 1; 1 Stark. Ev. 303, 304; *Adams v. Broughton*, 2 Str. 1078; *Kel. 58*. In actions of assumpsit, &c., where the party has no opportunity to plead the former verdict as an estoppel, the record thereof may be given in evidence, and is conclusive and binding on the party, the court and the jury, as to every fact in issue, and distinctly decided by the former verdict. *Wright v. Butler*, 6 Wend. 288, 289; *Gardner v. Buckbee*, 3 Cowen, 120; *Train v. Gold*, 5 Pick. 389; *Young v. Black*, 7 Cranch, 565; 2 Stark. Ev. (5th Am. ed.) 707; *Kitchen v. Campbell*, 3 Wils. 304. See *Kilheffer v. Herr*, 17 Serg. & R. 319, 322; *Cowen & Hill's notes to Phil. Ev.* pt. 2, p. 305 *et seq.* *Contra*, *Church v. Leavenworth*, 4 Day, 274. So, the former verdict and judgment are sometimes conclusive when given in evidence under the general issue in an action of debt. 2 Stark. Ev. *ubi supra*.]

(y) *Eastmure v. Lawes*, 7 Scott, 461. As to pleading, that the plaintiff had judgment on a claim of set-off in the county court, see *Stanton v. Styles*, 5 Exch. 578.

(z) *Phillips v. Ward*, 2 H. & C. 717.

4. Considerable doubt was formerly entertained on the question, whether a judgment recovered in a foreign court is conclusive between the parties, or is subject to be reagitated, in an action brought thereon in the courts of this country. (a) But the rule may now be taken to be: that if a question has been decided by such a court, in a proceeding *in personam*, between parties properly brought before it, this will preclude an inquiry in our courts between the same parties into the merits of the case, upon the facts so found; for this reason, that whatever constituted a defence in the foreign court, ought to have been pleaded there. (b)

Foreign judgment *in personam*, how far conclusive, when action brought thereon in this country.

(a) Per Tindal C. J. *Smith v. Nicholls*, 7 Scott, 147, 167.

(b) See per Cur. Bank of Australasia *v. Nias*, 16 Q. B. 717, 737; *Henderson v. Henderson*, 6 Q. B. 288, 298, 299; and see *Reimers v. Druce*, 26 L. J. C. 196; *Ricardo v. Garcias*, 12 C. & F. 368; *Cammell v. Sewell*, 3 H. & N. 617; 5 Ib. 728; *Simpson v. Fogo*, 29 L. J. C. 657; *Castrique v. Imrie*, 8 C. B. N. S. 1; *Imrie v. Castrique*, Ib. 405; [S. C. L. R. 4 H. L. 414;] per De Grey C. J. *Duchess of Kingston's case*, 20 How. State Trials, 538; *Bul. N. P.* 244; *Phillips v. Hunter*, 2 H. Bl. 402; [*Houlditch v. Donegall*, 2 Cl. & Fin. (Am. ed.) 470, note (2), and cases cited; *Rankin v. Goddard*, 54 Maine, 28, 33; *Monroe v. Douglas*, 4 Sandf. Ch. 126; *Cummings v. Banks*, 2 Barb. 602; *Lazier v. Westcott*, 26 N. Y. 146; *Barron v. West*, 23 Pick. 270; *Norwood v. Cobb*, 20 Texas, 456; 2 Kent, 119, 120; *Gleason v. Dodd*, 4 Met. 336; *Middlesex Bank v. Butman*, 29 Maine, 19; *Taylor v. Barron*, 30 N. H. 78; *Bigelow Estoppel*, 185 *et seq.* The judgments and decrees of the courts in the different states of the Union have, by the constitution and a statute thereof, the same dignity and conclusive effect in each state, as in that where rendered. See *Bissell v. Briggs*, 9 Mass. 462; *Bigelow on Estoppel*, 195 *et seq.* As to judgments obtained before the justices of the peace, or in the justices' courts of any of the states, it has been determined in New Hampshire and Massachusetts, that the record of a judgment of a justice of the

peace rendered in one state, cannot be authenticated in the manner prescribed by the act of congress, so as to entitle it to the same credit in another state as it has in that wherein rendered; and such a judgment must be considered in the courts of such other state, as standing on the same ground as a foreign judgment, and as leaving the whole merits of the cause open to discussion and explanation. *Robinson v. Prescott*, 4 N. H. 450; *Warren v. Flagg*, 2 Pick. 448 (2d ed.), 449, note (1). See, also, *Collins v. Modisett*, 1 Blackf. 60; *Cole v. Driskell*, 1 Blackf. 16; *Mahurin v. Bickford*, 6 N. H. 567; *Adair v. Rogers*, *Wright*, 428; *Poorman v. Crane*, *Wright*, 337; *Goodrich v. Jenkins*, *Wright*, 348. In a recent case in the State of New York, *Thomas v. Robinson*, 3 Wend. 267, the efficacy of such a judgment, so certified, was admitted *sub modo*; therefore, it was held, that a suit cannot be maintained in that state on a judgment rendered by a justice of the peace in another state, unless the statute organizing his jurisdiction be shown; but that if, on the statute being produced and proved, it appears that the subject-matter of the suit was within the justice's jurisdiction, and the proceedings were shown by the record to have been in conformity with the directions of the statute, the judgment will be entitled to full faith and credit. See, also, *Sheldon v. Hopkins*, 7 Wend. 435; *Cleveland v. Rogers*, 6 Wend. 438. All the cases agree, both as to foreign and state judgments or decrees, that in order to make them

Nor is the pendency of an appeal in the foreign court, a bar to an action on the judgment, in the courts of this country. (*c*)

And if the proceeding in the foreign court be *in rem*, — *e. g.* in the case of the condemnation of a ship, by the sentence of a foreign court of admiralty of competent jurisdiction, — this is binding upon all parties, and in all countries, as to the existence of the facts upon which the condemnation proceeded. (*d*)

But it is at the same time well established that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; and that it must not be left uncertain, or to be collected by inference only, whether the ship was condemned upon one ground, which would be a just cause of condemnation by the law of nations; or on another, which would amount only to a breach of the municipal regulations of the condemning country. (*e*)

So, if it appear on the face of a foreign judgment, that the foreign law, or some part of the proceedings of the foreign court, is repugnant to natural justice, such judgment will not be conclusive between the parties in this country. (*f*)

But a judgment *in rem*, of a foreign tribunal, which has jurisdiction over the subject-matter, and has acted within its jurisdiction, cannot be questioned by the courts of this country, (*g*) even al-

effectual to any purpose, the court in which they are rendered must have jurisdiction over the parties. And this jurisdiction is always open to inquiry whenever such judgments are offered either in support of an action or as a ground of defence. *Gleason v. Dodd*, 4 Met. 333; *Story Com. on Const. ch. 29, § 1297-1307*; *Starbuck v. Murray*, 5 Wend. 158; *Holbrook v. Murray*, 1b. 161; *Hall v. Williams*, 6 Pick. 232; *Aldrich v. M'Kinney*, 4 Conn. 380; *Harrod v. Barretto*, 1 Hall, 155; *Benton v. Burot*, 10 Serg. & R. 242; *Hoxie v. Wright*, 2 Vt. 263; *Harding v. Alden*, 9 Greenl. 140; *M'Kim v. Odom*, 3 Fairf. 94; *Thurber v. Blackburne*, 1 N. H. 242; *Rogers v. Coleman*, Hardin, 413; *Winchester v. Evans*, Cooke, 429; *Curtis v. Gibbs*, 1 Penning. 299; *Wermwag v. Pawling*, 5 Gill & J. 500; *Hodge v. Deaderick*, 1 Yerger, 125; *Miller v. Miller*, 1 Bailey, 242; *Warren v. Flagg*, 2 Pick. (2d ed.) 448, note (1).]

(*c*) *Scott v. Pilkington*, 2 B. & S. 11.

(*d*) *Simpson v. Fogo*, 29 L. J. C. 657; *Castrique v. Imrie*, 8 C. B. N. S. 1; *Imrie v. Castrique*, 1b. 405; 2 Smith L. C. 452; [per Marshall C. J. in *The Mary*, 9 Cranch, 126, 144; *Baudac v. Nicholson*, 4 Miller (La. R.), 81-86; *Thomas v. Southard*, 2 Dana, 475, 482; *Story Conf. Laws*, 491 *et seq.*; *Croudson v. Leonard*, 4 Cranch, 434; 3 Phil. Ev. (Cowen & Hill's notes) pt. 2, p. 880 *et seq.*; *Bigelow Estoppel*, 164 *et seq.*]

(*e*) Per Tindal C. J. *Dalgleish v. Hodgson*, 7 Bing. 495, 504.

(*f*) See *Henderson v. Henderson*, 6 Q. B. 288. For instances see *Vallée v. Dumergue*, 4 Exch. 290; 18 L. J. Exch. 398; *Reynolds v. Fenton*, 3 C. B. 187; *Cowan v. Braidwood*, 1 M. & G. 882; 2 Scott N. R. 138; *Fergusson v. Mahon*, 11 A. & E. 179.

(*g*) *Castrique v. Imrie* (in Dom. Proc.), L. Rep. 4 Ap. Ca. 414; affirming the judg-

though such judgment may have proceeded on a mistaken view of the law of England; unless, perhaps, where there appears on the face of the judgment, a perverse and deliberate refusal to recognize that law; in which case, it is said, it would be the duty of our courts to refuse to recognize the efficacy of the foreign judgment. (*h*)

And it would seem, — notwithstanding an opinion has been entertained to the contrary, (*i*) — that the same rule applies even to the case of a foreign judgment *in personam*. (*j*)

7. Arbitrament and Award. (*k*)

1. Where two parties have submitted a question of unliquidated damages to the decision of an arbitrator, and he has made his award thereon, such award concludes the right, unless the award itself can be impeached. (*l*) And if an action be

ment of the exchequer chamber, in *Imrie v. Castrique*, 8 C. B. N. S. 405, 417.

(*h*) Per *Wood v. C. Simpson v. Fogo*, 32 L. J. C. 249, 257; and see per Lord *Hatherley C. Castrique v. Imrie*, L. Rep. 4 Ap. Ca. 414, 445.

(*i*) See 2 *Smith L. C.* (2d ed.) 448, citing *Novelli v. Rossi*, 2 B. & Ad. 757.

(*j*) *Godard v. Gray* L. Rep. 6 Q. B. 139.

(*k*) See *Roll. Abr. Arbitrament (V.)*; *Com. Dig. Accord (A. 1)*; *Bac. Bbr. Arbitrament (G.)*.

(*l*) Per *Taunton J. Whitehead v. Tattersall*, 1 A. & E. 491, 492. [In *Smith v. Boston, Concord & Montreal R. R.* 36 N. H. 458, 489, 490, *Bell J.* said: "Though there are cases where it has been held that a reference to a third person, to measure materials or work, to judge of their quality, to fix a price, or to make an appraisal, or the like, is not a submission to arbitration; yet it seems to us, that every agreement of parties, by which they bind themselves to abide by the decision of an indifferent third person, as to any matter affecting their rights, is a submission to arbitration, and the decision of such third party, upon the matter thus referred to him, is an award." "Such an award, decision, appraisal, measurement, or whatever it may be called, of such third

person, fairly made, is final and conclusive upon the question referred to him, and upon the rights of the parties in relation to it. See *Keeble v. Black*, 4 Texas, 69; *Bean v. Wendell*, 22 N. H. 588; *Pike v. Gage*, 29 N. H. 470; *Hale v. Handy*, 26 N. H. 470; *Jones v. Stevens*, 5 Met. 373; *Branscome v. Boweliff*, 6 C. B. 623. But "it may well be understood that a stipulation in a contract for labor and services to be performed for a corporation, that the work is to be done to the satisfaction of a servant or agent of the corporation, confers no capricious power on such agent, nor any power by his decision to bind conclusively the rights of the parties. He can have no power to deprive a party of his pay by refusing to make an estimate or measurement, nor power to reduce his compensation by a false measurement or estimate. We think, therefore, it may well be doubted, whether the measurement, appraisal, or other decision of a person so situated, that he cannot, by any possibility, be regarded as indifferent or impartial, can justly be held to have in any degree the conclusive character of an award." *Smith v. Boston, Concord & Montreal R. R.* *ubi supra*. See *Ranger v. Great Western R. R.* 5 H. L. Cas. 72, 105; *Lauman v. Young*, 31 Penn. St. 306.]

brought for the recovery of such damages, a plea of arbitrament and award, as it is technically termed, is a good bar, (*m*) even although the defendant has not performed the award. Thus, in the case of *Gascoyne v. Edwards*, (*n*) where the declaration was in covenant on a lease for not repairing, the defendant had judgment on a plea of an award, by which it was directed that the defendant should pay the plaintiff 5*l.*; should put the premises in repair; and should leave the same at a certain time. So, where covenantor and covenantee submitted the amount of damages accruing from a breach of covenant, to an arbitrator; it was held, in an action on the covenant, that the arbitrator's award was conclusive as to the amount of such damages. (*o*). And so, where an arbitrator awarded that the sum of 4,800*l.* should be deducted from 6,800*l.*, the amount of the plaintiff's claim; it was held, in an action brought to recover the 6,800*l.*, that the award might be pleaded in bar as to the 4,800*l.* parcel of that sum. (*p*)

And where all matters in difference are referred, the party ought, as to every matter within the scope of the reference, to come forward with the whole of his case before the arbitrator, if he mean to insist upon it as a matter in difference; and he cannot reserve it, so as to make it the subject-matter of a fresh action. (*q*) Thus,

(*m*) See Form, Chit. jun. Pl. 3d ed. 324.

(*n*) 1 Y. & J. 19, decided on general demurrer; S. C. cited by Lord Lyndhurst C. B. in *Allen v. Milner*, 2 C. & J. 53. See *Crofts v. Harris*, Carth. 187; *Allen v. Harris*, 1 Ld. Raym. 122.

(*o*) *Whitehead v. Tattersall*, 1 A. & E. 491.

(*p*) *Parkes v. Smith*, 15 Q. B. 297; and see *Commings v. Heard*, L. Rep. 4 Q. B. 669.

(*q*) *Smith v. Johnson*, 15 East, 213. [But the prevailing rule seems to be, that where a verdict, award, or judgment, has not necessarily, though apparently, covered the ground on which a second action is brought, although perhaps it would be *primâ facie* evidence that the matter had passed *in rem judicatam*; yet it may be averred, and proved by parol evidence, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided. *Snider v. Croy*,

2 John. 227; *Phillips v. Berick*, 16 John. 136; *Webster v. Lee*, 5 Mass. 334; *Whittemore v. Whittemore*, 2 N. H. 26; *Hodges v. Hodges*, 9 Mass. 320; *Smith v. Whiting*, 11 Mass. 445. See *Homes v. Avery*, 12 Mass. 134; *Newburyport M. I. Co. v. Oliver*, 8 Mass. 402; *Boyd v. Davis*, 7 Mass. 359; *Bixby v. Whitney*, 5 Greenl. 192; *Buck v. Buck*, 2 Vt. 420; *Newman v. Wood*, *Martin & Yerg.* 190; *Badger v. Titcomb*, 15 Pick. 409. A. and B. made a submission of all demands, upon which an award was made in favor of B. At the time of the submission, A. was prosecuting actions against other persons, the subject of which was not brought before or considered by the arbitrators. After the award, the defendants in those actions prevailed, on the evidence of B., that he was the party liable for the debts so sued for. It was held, that the submission and award were not a bar to a subsequent action by A. against B. on those debts. *King v. Savory*, 8 Cush. 309.]

in *Dunn v. Murray*, (r) the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant, in a certain capacity, for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year; and alleged as a breach, that the defendant dismissed the plaintiff from his employ before the end of the year, without any reasonable or probable cause. The declaration also contained counts for wages, and for work and labor, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money, equivalent to the wages he would have been entitled to receive from the defendant, on the day when the action was commenced. No claim was made before the arbitrator for any compensation for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim; but the plaintiff afterwards brought an action to recover such compensation, in consequence of his dismissal from the defendant's employ before the end of the year; and it was held that the award of the arbitrator was a bar to such action.

2. But where the action is brought for a *debt*, and the award made has only decided that it is due, and ascertained its amount; and the money payable under the award is ^{When not.} nothing but the original debt, so ascertained in amount, the plea of arbitrament and award is bad. Thus, in *Allen v. Milner*, (s) the action was in *indebitatus assumpsit* for tolls. The defendant pleaded, that differences had arisen between him and the plaintiff touching the claim; and that they mutually submitted themselves to refer, and did refer, the said matters in difference to arbitration; that they mutually promised to abide by the award; and that the umpire made his award of and concerning the said premises, and did thereby award that the defendant should pay to the plaintiff the sum of 13*l*. To this plea the plaintiff demurred specially, because the plaintiff did not aver payment of the 13*l*., or any other satisfaction of the plaintiff's demand. The question therefore was, whether this award was of itself, without payment or satisfaction, any bar; and the court, considering the nature of the plaintiff's demand, and the nature of the award, were of opinion that it was

(r) 9 B. & C. 780.

(s) 2 C. & J. 47.

not. Lord Lyndhurst C. B. in delivering the judgment of the court, said: "The plaintiff's demand is for a debt, and the award is not for the performance of any collateral act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, whether there were any and what debt; the award only ascertains that there is a debt, specifies the amount, and directs the payment; but the money, till paid, is due in respect of the original debt; *i. e.* for tolls; its character remains the same; nothing is done to vary its nature, or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and the award had directed a payment of money in satisfaction of the demand, it might then have been said that the award had changed the nature of the original demand; that the right to have the goods was gone, and the only right remaining was the substituted right, *i. e.* the right to have the money; or, had the demand been for a debt, and the award had directed, not payment in money, but payment in a collateral way, as by delivery of goods, performance of work, &c., it might perhaps have been said that the right to have payment in money was gone; but here the 13*l.* is to be paid for the original demand, *i. e.* for the tolls; and it is to be paid, as that demand was to have been paid, *i. e.* in money."

So it is said that, in general, an award cannot be pleaded in bar of an action, unless it appear that a present satisfaction for the plaintiff's demand was given by the award itself; or one which is to be executed afterwards and before action brought, or in respect whereof the plaintiff may have an action. (*t*) And this rule applies, wherever it has been awarded that something shall be paid to the plaintiff, or done in his favor. (*u*) So that if, in such a case, the thing awarded to be done be at all times executory, and at the will of the parties, and there be no means of enforcing performance thereof by action, or of recovering satisfaction for the non-performance thereof, such an award is not pleadable in bar. (*x*)

But it is said, that where the award is for payment of money, and the day of payment is not past, it is sufficient to plead the award itself, because the plaintiff has his remedy for the money by action of debt on the award. (*y*) It is otherwise, however, where the day of payment is

When performance of the award must be pleaded.

(*t*) See *Dighton v. Whiting*, 1 Lut. 15, 56; 1 Roll. Abr. 266, 277.

(*u*) Per Lord Campbell, *Parkes v. Smith*, 5 Q. B. 297, 308.

(*x*) *Dighton v. Whiting*, 1 Lut. 15, 56.

(*y*) *Ib.*; 1 Roll. Abr. 266, 277.

past. (*y*) And so, if the award be to do a collateral act, as to seal a bond, or the like; in this case, when the day is past, a plea of the award will not bar the plaintiff, unless the defendant likewise plead that he has performed the award; or alleges some default in the plaintiff as the reason for his not having done so. (*y*)

Nor can a mere agreement to refer a certain matter, or all matters in difference between two parties, to arbitration, be pleaded in bar of an action brought in respect thereof. (*z*) And although it has been said, with reference to this question, that "if there had been a reference depending, it might have been a bar;" (*a*) yet it is now decided, that the pendency of an arbitration is no answer to an action for the recovery of a debt. (*b*)

Pendency of arbitration no bar.

By agreement between the parties, however, it may be made a condition precedent to the right to bring an action, that the amount of the damages, or the time for paying them, or any matter of that kind which does not go to the root of the action, shall be settled by arbitration. (*c*) But in *Goldstone v. Osborne*, (*d*) where it appeared

Award of an arbitrator may be a condition precedent to the right to bring an action.

(*y*) *Ib.*; 1 Roll. Abr. 266, 277.

(*z*) *Per Cur. Thompson v. Charnock*, 8 T. R. 139, 140; and see *Horton v. Sayer*, 4 H. & N. 643; *Lee v. Page*, 30 L. J. C. 857; *Roper v. Lendon*, 1 E. & E. 824; *Tattersall v. Groote*, 2 B. & B. 131; *Street v. Rigby*, 6 Ves. jun. 815; [*Smith v. Boston, Concord & Montreal R. R.* 36 N. H. 458.] But where there is such an agreement, and an action is brought on the instrument which contains the agreement, the court or a judge may, on the application of the defendant, order a stay of proceedings. 17 & 18 Vict. c. 125, s. 11; *Blyth v. Lafone*, 1 E. & E. 455; and see *Russell v. Pellegrini*, 6 E. & B. 1020; *Re Newton*, 19 C. B. N. S. 342; *Wilcox v. Storkey*, L. Rep. 1 C. P. 671. And the court will make this order, even where the matter in difference is one of law. *Randegger v. Holmes*, L. R. 1 C. P. 679. The court will not order a stay of proceedings under this section, if there be a *bonâ fide* suggestion of fraud; *Wallis v. Hirsch*, 1 C. B. N. S. 316; or where it is admitted

that there is no defence to the action. *Lury v. Pearson*, *Ib.* 639. *Wood V. C.* refused to stay proceedings under this section, where the bill prayed a dissolution of partnership on the ground of fraud. *Cook v. Catchpole*, 34 L. J. C. 60. But an agreement to refer, under the "Railway Companies' Arbitration Act, 1859" (22 & 23 Vict. c. 59), ousts the jurisdiction of the courts, see s. 26, and *Watford & c. Railway Company v. London & North Western Railway Company*, L. Rep. 8 Eq. 231. And an action will lie, for the breach of an agreement to refer. *Livingston v. Ralli*, 5 E. & B. 132.

(*a*) *Kill v. Hollister*, 1 Wils. 129.

(*b*) *Harris v. Reynolds*, 7 Q. B. 71. In that case the question was raised, but was not decided, whether the pendency of an arbitration could be pleaded *in abatement* of an action for the same cause.

(*c*) *Avery v. Scott* (in Cam. Scac.), 8 Exch. 497; reversing the judgment of the court of exchequer, in *Scott v. Avery*, *Ib.* 487; and see *Tredwen v. Holman*, 1 H. &

that one of the conditions in a policy of insurance against fire stated, that if any difference should arise on any claim, it should be immediately submitted to arbitration; and, after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award, determining the amount thereof, should be duly made; it was held, that the assured might maintain an action on such policy, notwithstanding the condition; as the insurers denied the general right of the assured to recover anything, and did not merely question the amount of damage. (*d*¹)

8. *Tender of Money.*

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| <ol style="list-style-type: none"> 1. In what cases a tender is available, and the effect thereof. 2. By whom a tender may be made. 3. To whom. 4. The amount to be tendered. | <ol style="list-style-type: none"> 5. The time when a tender may be made. 6. The mode of making it. 7. Of a prior or subsequent demand, to defeat a tender. 8. The pleadings. |
|---|---|

1. The tender of a debt before action brought is available as a defence, wherever the demand is of a pecuniary nature, and is reduced or reducible to a certainty. (*e*)
So, there may be a valid tender even where the claim

When a tender is available.

C. 72; *Elliott v. Royal Exchange Assurance Company*, L. Rep. 2 Ex. 237; *Hemans v. Picciotto*, 1 C. B. N. S. 646; *Braunstein v. Accidental Death Insurance Company*, 1 B. & S. 782; *Lowndes v. Earl Stamford*, 18 Q. B. 425; [*Smith v. Boston, Concord & Montreal R. R.* 36 N. H. 458, 487; *Lauman v. Young*, 31 Penn. St. 306; *Snodgrass v. Gavit*, 28 Penn. St. 224.]

(*d*¹) [See *Lauman v. Young*, 31 Penn. St. 306.]

(*e*) See, in general, Com. Dig. and Bac. Abr. tit. Tender. [Where the performance of the contract is dependent upon some act of the promisee, and cannot be completed without his concurrence, if the promiser does everything on his part necessary to a complete performance, but the promisee refuses to concur in what is necessary on his part, the promiser is discharged from liability for the non-completion of the contract. "In every contract

by which a party binds himself to deliver goods, or pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made." Per Rolfe B. *Startup v. Macdonald*, 6 M. & Gr. 593, 610.] When the money has not been formally tendered before writ issued, the defendant should pay it into court with the *special plea*, given by the 15 & 16 Vict. c. 76, s. 71; but on this plea defendant pays costs, if plaintiff do not proceed.

is upon a *quantum meruit*. (*f*) And so, on a bare covenant for the payment of money, the defendant may plead a tender. (*g*)

But a tender cannot be pleaded, where the action is brought strictly for the recovery of *unliquidated* damages. (*h*)

A tender does not *bar* or *extinguish* the *debt*; (*i*) for the debtor is still liable to pay it whenever he is required to do so. ^{Its effect.} But it bars any claim for subsequent damages or interest, for not paying or for detaining the debt; and it entitles the defendant to judgment against the plaintiff for his costs. (*k*)

So a tender admits the contract, and such facts as are specially

(*f*) *Johnson v. Lancaster*, Str. 576; *Cox v. Brain*, 3 Taunt. 95; and see, per Lord Denman, *Dearle v. Barrett*, 2 A. & E. 82, 83.

(*g*) *Johnson v. Clay*, 7 Taunt. 486; 1 Wms. Saund. 33 d.

(*h*) *Dearle v. Barrett*, 2 A. & E. 82; [*Green v. Shurtliff*, 19 Vt. 592.] As to a tender of goods in performance of a contract, see *Startup v. M'Donald*, 6 M. & G. 593; *Isherwood v. Whitmore*, 11 M. & W. 347; S. C. 10 M. & W. 347. As to a tender of amends, in an action for an involuntary trespass, where the defendant disclaims title, see 21 Jac. 1, c. 16, s. 5; Com. Dig. Pleader, 3 M. 36; Vin. Abr. Trespass (S.) a; Bac. Abr. Tender (P. 8). [See *Slack v. Brown*, 13 Wend. 390; *Lawrence v. Gifford*, 17 Pick. 366; *Warren v. Nichols*, 6 Met. 261.] In an action against magistrates, 11 & 12 Vict. c. 44, s. 11; 24 Geo. 2, c. 44, s. 2; in case of an irregular distress, 11 Geo. 2, c. 19, s. 20; and in other particular cases, Bac. Abr. tit. Tender (P.).

(*i*) Per Cur. *Dixon v. Clark*, 5 C. B. 365, 377; *Cooper v. Phillips*, 1 Cr. M. & R. 649. [Hence, the plea of tender must not only aver a tender on the day when the debt was due and a subsequent continual readiness to pay, but must be accompanied by a payment into court of the money tendered. If the defendant pleads a tender without paying the money into court, the plaintiff is entitled to judgment for the amount of debt to which the tender is pleaded, as being admitted to be due and not paid. *Chapman v. Hicks*, 2 Cr. & M.

633. As the plea of tender, if successful, shows that the action was unnecessary and defeats it, the money paid into court under the plea of tender, though it is taken out by the plaintiff, is not to be considered as money recovered by him in the action; and therefore it cannot be reckoned towards the amount of the sum recovered for which the plaintiff would be entitled to sue in the superior courts instead of the county courts, or for which he would be entitled to have his costs taxed upon the higher scale. *James v. Vane*, 2 E. & E. 883, overruling *Cooch v. Maltby*, 23 L. J. Q. B. 305.]

(*k*) Per Cur. *Dixon v. Clark*, 5 C. B. 365, 377. [The principle of the plea of tender is, that the defendant has been always ready to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. It thus shows that the plaintiff might have obtained what he claims without an action, and that the action was unnecessary. *Dixon v. Clark*, 5 C. B. 365, 377; *James v. Vane*, 2 E. & E. 883; 29 L. J. Q. B. 169; *Law v. Jackson*, 9 Cowen, 641; S. C. 5 Cowen, 248; *Coit v. Houston*, 3 John. Cas. 243; *Carley v. Vance*, 17 Mass. 389; *Raymond v. Bearnard*, 12 John. 274; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106; *Cornell v. Green*, 10 Serg. & R. 14; *Cockrill v. Kirkpatrick*, 9 Mis. 697; *Fuller v. Pelton*, 16 Ohio, 457.]

stated in that part of the declaration to which the plea of tender is pleaded. (*k*¹) And, accordingly, where a count averred that, in consideration that the plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.*; and that the plaintiff did let the said tithes, and permit the defendant to take them; it was held, that a plea of tender to such count, precluded the defendant from showing an interruption to his taking the tithes. (*l*)

2. A tender need not be made by the debtor in person; but it

By whom
made.

may be made by a third person, by his desire and on his behalf. (*m*)

So any person may make a tender on behalf of an idiot; (*m*¹) for the law, by reason of his utter inability to act for himself, allows this to be done out of charity. (*n*)

And a tender by an agent, at his own risk, of more than the money given him by his principal, is good. (*o*)

3. So, a tender need not be to the creditor personally; but it

To whom
made.

may be made to an agent authorized to receive the money for him. (*p*)

(*k*¹) [See *Huntington v. American Bank*, 6 Pick. 340; *Bacon v. Charlton*, 7 Cush. 581; *Jones v. Hoar*, 5 Pick. 285. But if the defendant in an action of assumpsit, containing the common money counts, and also a count for the use and occupation of certain premises described, pays a part of the sum demanded into court, without specifying to which of the counts the payment is to be applied, such payment is an admission only, that the defendant owes the plaintiff, on some one or several of the counts, the sum so paid; but is not an admission of any particular contract or debt under any one of the counts, nor of a liability on all of them. *Hubbard v. Knous*, 7 Cush. 556. This case refers to *Huntington v. American Bank*, *supra*, and expressly dissents from any expressions in that case which do not accord with the above decision. See *Kingham v. Robins*, 5 M. & W. 94; *Archer v. English*, 1 M. & Gr. 873; *Stapleton v. Nowell*, 6 M. & W. 9; *Story v. Finnis*, 5 Exch. 126.]

(*l*) *Cox v. Brain*, 3 Taunt. 95.

(*m*) *Cropp v. Hambleton*, Cro. Eliz. 48;

1 Roll. Abr. 421; Bac. Abr. Tender (A.). As to a tender by a stranger, without the privity of the debtor, see Co. Lit. 206, 207; *Watkins v. Ashwicke*, Cro. Eliz. 132. *Semble*, the subsequent assent of the debtor would make the tender valid. See per Best C. J. *Harding v. Davis*, 2 C. & P. 77, 78. [A tender made by an inhabitant of a school district, to one having a claim against it, is valid, though such inhabitant was not thereto regularly authorized by the district. *Kincaid v. School District No. 4*, in *Brunswick*, 2 Fairf. 188. This tender is good, because the inhabitant is liable as a member of a quasi corporation.]

(*m*¹) [So, a tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living; held to be good, although the uncle had not then been appointed guardian. *Brown v. Dy-singer*, 1 Rawle, 408.]

(*n*) Co. Lit. 206 b.

(*o*) *Read v. Goldring*, 2 M. & S. 86.

(*p*) Per Parke B. *Kirton v. Braithwaite*, 1 M. & W. 310, 313; *Goodlead v. Blewitt*,

Thus a tender of rent and expenses may be made to a landlord, through the medium of a broker, even after the landlord has distrained. (*q*) So, where a creditor told his clerk, ^{To agent.} who had been previously authorized to receive the money, not to receive a certain sum, if it should be offered him by a certain debtor, for that he had put the matter into the hands of his attorney; and the clerk, on tender made, refused to receive the money, and stated the reason; it was held, that this was a good tender to the principal. (*r*)

In an action for work and labor, there was a plea of tender, whereon issue was joined. The defendant proved that he sent the money by his servant, to the plaintiff's house. The defendant's servant swore that she carried it to the plaintiff's house; and that, having seen a servant there, who informed her that her master was at home, she delivered the money to that servant, to be delivered to her master; that the servant took it, and went into the house, as she supposed, to deliver it to the plaintiff; and that she returned with an answer that he would not receive it, but that she must go to his attorney; and Lord Kenyon is reported to have held, that this was evidence to be left to the jury, from which they might infer that a tender had been made. (*s*)

After an attorney has been authorized by his client, the creditor, to apply for payment of a debt, and has written de- ^{Attorney.} manding payment thereof to himself, a tender to such attorney is good. (*t*) So, where the attorney demands payment at his office, a tender to any person who is in the office, carrying on the business, is sufficient. (*u*)

1 Camp. 477. [A tender made to a clerk, in the store of the plaintiff, for goods purchased at such store, is equivalent to a tender to the principal himself, and is sufficient, though prior thereto the claim had been lodged with an attorney for suit. Hoyt v. Byrnes, 2 Fair. 475. A tender of money to an attorney, with whom a demand is lodged for collection, before a suit is brought, is unavailing under the statute of New Hampshire. Thurston v. Blaisdell, 8 N. H. 367. If made after an action is commenced, the costs must be tendered. *Ib.*]

(*q*) Smith v. Goodwin, 4 B. & Ad. 413. But mere readiness to pay the money on

the land would not be sufficient, at least in an action on the covenant. Haldane v. Johnson, 8 Exch. 689.

(*r*) Moffatt v. Parsons, 5 Taunt. 307.

(*s*) Anon. 1 Esp. 349.

(*t*) Watson v. Hetherington, 1 C. & K. 36. [A tender to one who is in fact the attorney of the creditor, is good, although he deny his authority. McInniffe v. Wheelock, 1 Gray, 600.]

(*u*) Per Parke B. Watson v. Hetherington, 1 C. & K. 36; Kirton v. Braithwaite, 1 M. & W. 310; and see Wilmot v. Smith, 3 C. & P. 453; S. C. Moo. & M. 238. Barrett v. Deere, *Ib.* 200; [Oatman v. Walker, 33 Maine, 67.]

And a tender of damages recovered, and for which the defendant is in execution, may be made to the party who appears upon the record to be the plaintiff's attorney. (*x*)

One of several creditors.

So, if there be several creditors to whom the money is due jointly, a tender to one of them is good ; but such tender should be pleaded as a tender to all the creditors. (*y*)

Executor.

And a tender to an executor, even before he has proved the will, is good, provided he afterwards prove it. (*z*)

4. It is clear that the debtor must tender the full amount of the debt, (*z*¹) a creditor not being bound to accept less than the whole of his demand, and that a tender of part of an entire demand is invalid. (*a*)

The amount to be tendered.

"If," however, "A. be indebted to B. in divers *distinct* sums of money, he may make a tender of any one of the sums;" (*b*) but in such a case the debtor ought to declare upon what account the tender is made. (*c*) And, therefore, where A. demanded from B. the sum of 1*l.* 7*s.* for several matters, including 10*s.* for a particular service performed by A. ; and B. tendered the sum of 19*s.* without applying it specifically to any portion of A.'s demand ; it was held, that this was not a good tender of the 10*s.* due on account of such service. (*d*) So, where a party has separate demands against several persons, for unequal sums, an offer of one sum for the debts of all, without distinguishing the claims against each, is not a valid tender ; and will not support a plea by one of the debtors, that the debt due from *him* was tendered. (*e*)

Where there are *distinct* claims.

So, if the condition of a bond be, that the obligor shall, at a day and place certain, "pay 20*l.* or deliver ten kine, at the *then* choice of the *obligee*;" a tender must, it is said, be made both of the money and the kine. (*f*)

But it appears that, when a quarter's rent is tendered and refused, and another quarter's rent accrues and is tendered, such sec-

(*x*) Crozer v. Pilling, 4 B. & C. 28, 29.

(*y*) Douglas v. Patrick, 3 T. R. 683.

(*z*) Eq. Ca. Ab. 319 ; Bac. Abr. Tender

(E.).

(*z*¹) [Boyden v. Moore, 5 Mass. 365.]

(*a*) Dixon v. Clark, 5 C. B. 365.

(*b*) Bac. Abr. Tender (B.). [So a tender of a gross sum upon several demands,

without designating the amount tendered upon each, is sufficient. Thetford v. Hubbard, 22 Vt. 440.]

(*c*) Latch. 70.

(*d*) Hardingham v. Allen, 5 C. B. 793, 798.

(*e*) Strong v. Harvey, 5 Bing. 304.

(*f*) Fordley's case, 1 Leon. 68.

and tender is sufficient, without tendering the whole rent then due. (*g*)

So, a tender of more money than is due, is good for what is due ; for, *omne majus continet in se minus*. (*h*) Thus, proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver, is sufficient to support a plea of tender of 20*l.* (*i*)

Tender of more than is due.

But a tender by a debtor of a larger sum than the amount due, by a bank-note for such larger sum, and out of which *he requires change*, is not a good tender of the smaller sum, if it be objected to on the ground of want of change. (*k*) If, however, the creditor do not object to the tender *on that account*, but make some collateral objection, or demand a larger sum, the tender will be good. (*l*)

5. Where, by the terms of the contract, the money is to be paid on a day certain, the tender, to be good, must be made on the very day. (*m*)

When to be made.

(*g*) *Bassett v. Prior of St. John of Jerusalem in England*, M. 2 H. 6, fo. 4, pl. 1 ; per *Martin J. Fitz Abr.* 1 R. 3, Verdict, pl. 13 ; 20 Vin. Abr. 182, pl. 2.

(*h*) *Wade's case*, 5 Co. 115, Res. 3 ; *Astley v. Reynolds*, 2 Str. 916 ; *Douglas v. Patrick*, 3 T. R. 683.

(*i*) *Dean v. James*, 4 B. & Ad. 546. And see *Bevans v. Rees*, 5 M. & W. 306.

(*k*) Per *Lord Abinger*, *Bevans v. Rees*, 5 M. & W. 306, 308 ; *Betterbee v. Davis*, 3 Camp. 70 ; *Robinson v. Cook*, 6 Taunt. 336. See per *Taunton J.* *Dean v. James*, 4 B. & Ad. 548 ; *Blow v. Russell*, 1 C. & P. 365.

(*l*) *Bevans v. Rees*, 5 M. & W. 306 ; *Black v. Smith*, *Peake*, 88, 89 ; *Saunders v. Graham*, *Gow*, 121.

(*m*) Per *Cur.* *Dixon v. Clark*, 5 C. B. 365, 378. [Where a certain space of time is allowed for the performance of the contract, as a day or several days, it is sufficient if the performance be completed before the end of the last. *Sheppard's Touch.* 378 ; *Leptley v. Mills*, 4 T. R. 170 ; *Startup v. Macdonald*, 6 M. & Gr. 593, 602, 619. In the case of a bill of exchange, the acceptor has the whole of the last day until twelve o'clock at night to pay it. Per *Parke B.* *Startup v. Macdonald*, 6 M. & Gr. 593,

602 ; and see *Leftley v. Mills*, 4 T. R. 172. If the performance is such that it requires the concurrence of the promisee to complete it, the promisor must tender all that is to be done on his part at a convenient interval before the expiration of the time, in order to allow the promisee to complete it by acceptance. If a sum of money is to be paid on a certain day, he must tender it sufficient time before midnight for the other party to receive and count it ; or if goods are to be delivered, he must tender them so as to allow sufficient time for examination and acceptance of them. *Wade's case*, 5 Co. Rep. 114 a ; *Startup v. Macdonald*, 6 M. & Gr. 593. If a certain time is fixed for the performance, the attendance of both parties at that place is necessary to complete the performance ; but for the convenience of both parties, and that neither may give longer attendance than is necessary, the law fixes a particular time at which the presence of each shall be sufficient. It is enough if each party be at the place at such convenient time before sunset on the last day limited as that the act may be completed by daylight ; and if the promisor tender to the promisee there, if present, or, if absent, be ready at the place to perform the act within a convenient

Consequently, a plea by the acceptor of a bill or the maker of a
Not post note payable at a future day, of a tender *post diem*, is
diem. had, although it allege a tender of the amount of the
 bill or note, with interest from the day it became due, up to the day
 of the tender. (n)

But the drawer of a bill has a reasonable time after notice of
 dishonor, to tender the amount of the bill without inter-
Before ac- est. (o) And where a bill or note is payable on de-
tion, good.

time before sunset for its completion, it is sufficient. If it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, it is sufficient. Co. Litt. 202 a; Wade's case, 5 Co. Rep. 114 a; Tinckler v. Prentice, 4 Taunt. 549; per Parke B. Startup v. Macdonald, 6 M. & Gr. 593, 624. This distinction is said to prevail in all the cases: "Where a thing is to be done *anywhere*, a tender a convenient time before midnight is sufficient; where a thing is to be done *at a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset." Per Parke B. Startup v. Macdonald, 6 M. & Gr. 593, 625. "If a man bound to pay twenty pounds at any time during his life at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee should be bound to perpetual attendance, and therefore the obligor, in respect of the uncertainty of the time, must give the obligee notice that on such a day, at the place limited, he will pay the money, and then the obligee must attend there to receive it. The same law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pounds at such a place certain, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for without such notice as is aforesaid, the tender will not be sufficient. But in both these cases, if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money." Co. Litt. 211 a. See Startup v.

Macdonald, 6 M. & Gr. 593. A tender made after the day a debt becomes due by a demand of payment, or after a contract is broken, or action brought, cannot be pleaded in bar of the action. City Bank v. Cutter, 3 Pick. 414; Suffolk Bank v. Worcester Bank, 5 Pick. 106; Dewey v. Humphrey, 5 Pick. 187; Maynard v. Hunt, 5 Pick. 240; Frasier v. Cushman, 12 Mass. 277. See Law v. Jackson, 9 Cowen, 641. The law on this subject has been altered in Massachusetts, so that a tender may now be made of a debt which has previously become due and payable. Genl. Sts. c. 130, § 23. By the common law and practice of Connecticut, a tender is good, though the day of payment has elapsed. Tracy v. Strong, 2 Conn. 659. Tender of money before it is due is of no avail, as the creditor is not bound to receive it before it is due, according to the terms of the contract. Per Parker C. J. Saunders v. Frost, 5 Pick. 267; per Ford J. in Tilton v. Britton, 4 Halst. 120. See Jouett v. Wagnon, 2 Bibb, 269. But see M'Hard v. Whetcroft, 3 Har. & M'Hen. 85. *Where tender to be made.* On a contract made in one state of the Union for the payment of money, the debtor is not bound to go to another state to tender the money to the creditor. Allhouse v. Ramsey, 6 Whart. 331. If no place be appointed for tender or performance, a tender to the person is good. Slingerland v. Morse, 8 John. 474; Bates v. Bates, Walker (Miss.), 401.]

(n) Dobie v. Larkan, 10 Exch. 776; Poole v. Tumbridge, 2 M. & W. 223; Hume v. Peplow, 8 East, 168.

(o) Walker v. Barnes, 5 Taunt. 240.

mand, a tender of the amount, with interest, at any time before action, is good. (*p*)

A tender cannot be effectually made, after the actual commencement of an action for the recovery of the debt, — that is, after the issuing of the writ; (*q*) nor after the creditor has brought and discontinued another action, in a different form, for the same money. (*r*)

But a tender will be good if made before the writ was issued, although, before the tender, the creditor had employed an attorney to sue the debtor, and the attorney had written a letter to the debtor demanding payment, and had applied for the writ. (*s*) So it was held under the old law, that a tender, made before the actual suing out of the process, could not be defeated by relation back to the *teste* of the writ; but that the day it actually issued must be regarded. (*t*) And it would seem that, at the present day, a tender cannot be defeated by the creditor issuing a writ, at a subsequent hour of the day on which the tender was made. (*u*)

6. All the cases agree that, to constitute a valid tender, there must either be an actual production of the money, or that its production must be expressly or impliedly dis- How to be made.
pensed with. (*x*)

(*p*) Per Parke B. *Norton v. Ellam*, 2 M. & W. 461, 463. [In cases where the debt is of an indefinite credit, unless the credit has been put an end to by a demand for payment, the tender of payment may be made at any time before process has actually issued. See *Caine v. Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97; *Smith v. Manners*, 5 C. B. N. S. 632; 28 L. J. C. P. 220; *Kington v. Kington*, 11 M. & W. 233; *Norton v. Ellam*, 2 M. & W. 461; *Cotton v. Goodwin*, 7 M. & W. 147; *Pigot v. Cubley*, 15 C. B. N. S. 701; 33 L. J. C. P. 134.]

(*q*) Bac. Abr. Tender (D.). [A tender may be made in Massachusetts even after action brought. Genl. Sts. c. 130, § 24. So in Vermont: *Hart v. Skinner*, 16 Vt. 138; *Green v. Shurtliff*, 19 Vt. 592. In Ohio, a tender of the amount due, together with the costs that had then accrued in a suit before a magistrate, where the tender was made after the commencement of the ac-

tion, is a bar to the recovery of further costs. *Hay v. Ousterout*, 3 Ham. 385.]

(*r*) See observations of Parke B. on the case of *Johnson v. Clay*, 7 Taunt. 486, in *Poole v. Tumblebridge*, 2 M. & W. 223, 226.

(*s*) *Briggs v. Calverly*, 8 T. R. 629; *Moffatt v. Parsons*, 5 Taunt. 307. [See *Hull v. Peters*, 7 Barb. 331.]

(*t*) *Smith v. Key*, Str. 638; *Wynne v. Wynne*, 1 Wils. 39; Bac. Abr. Tender (D.).

(*u*) See *Kirton v. Braithwaite*, 1 M. & W. 310. [If, at the time of making a tender, the debtor has no knowledge of the commencement of a suit, and the creditor do not inform him thereof, nor make claim of costs, but refuse to accept the amount tendered solely on account of its insufficiency to pay the debt, it may be regarded as a waiver of all claim for costs. *Haskell v. Brewer*, 2 Fairf. 258. As to a tender of the principal without interest, if not objected to for that omission, see *Connell v. Mulligan*, 13 Sm. & M. 388.]

(*x*) Per Tindal C. J. *Finch v. Brook*, 1

The following authorities will illustrate this proposition : —

The defendant said to the plaintiff, "I have eight guineas in my pocket, which I have brought for the purpose of satisfying your demand ;" whereupon the plaintiff told him that he need not give himself the trouble of offering it, for he would not take it, as the matter was then in the hands of his attorney ; and the court held that the tender was good. (y)

A person who made a tender, had two bank-notes twisted up in his hand, inclosing sovereigns and silver, and making together the precise sum intended to be paid. He told the creditor what the parcel consisted of, but did not open it before him ; and Best C. J. said, "I am of opinion this is a sufficient tender. If the witness had not mentioned the amount, I think it would not have done." (z) So, where the defendant's attorney called at the plaintiff's shop to pay him a debt, he having money in his pocket for that purpose ; and, having mentioned the precise sum, he put his hand in his pocket to take out the money, but did not actually

Scott, 70, 76 ; [Sands v. Lyons, 18 Conn. 18. See *Blight v. Ashley*, 1 Peters, 24 ; *Slingerland v. Morse*, 8 John. 474 ; *Borden v. Borden*, 5 Mass. 67. A tender must be made in such a manner and under such circumstances that the party entitled under the contract may have an opportunity of seeing that what is presented for his acceptance is really what he stipulated to have. Per Rolfe B. *Startup v. Macdonald*, 6 M. & Gr. 593, 610 ; *Isherwood v. Whitmore*, 10 M. & W. 757 ; 11 M. & W. 347. Money is not properly tendered when locked up in a box, so that the party to whom it is offered cannot open it and examine the contents. But the tender of a large sum of money in purses or bags, being the usual manner of carrying money, and which the creditor might open if he pleased, was held to be a good tender, provided the sum was correct. *Wade's case*, 5 Co. Rep. 114 a. ; *Co. Litt.* 208 a. And so, a tender of goods is not properly made by an offer to deliver closed casks, said to contain the goods, but the contents of which are not allowed to be seen and examined. *Isherwood v. Whitmore*, 11

M. & W. 347. A mere offer to pay, it not appearing that the debtor had the money ready, does not amount to a tender. *Fuller v. Little*, 7 N. H. 535 ; *Sargent v. Graham*, 5 N. H. 440 ; *Brown v. Gilmore*, 8 Greenl. 107 ; *Breed v. Hurd*, 6 Pick. 356 ; *Wheeler v. Knaggs*, 8 Ohio, 169 ; *Bakeman v. Pooler*, 15 Wend. 637.]

(y) *Douglas v. Patrick*, 3 T. R. 683 ; *Read v. Goldring*, 2 M. & S. 86 ; [Hazard v. Loring, 10 Cush. 267 ; *Barker v. Parkenhorn*, 2 Wash. C. C. 142 ; *Parker v. Perkins*, 8 Cush. 318. He who makes a tender is not bound to count out the money ; it is enough if the money be there, and offered to the party ; it is for the payee to tell the money. *Wheeler v. Knaggs*, 8 Ohio, 169 ; *Behaly v. Hatch*, Walker (Miss.), 369 ; *Breed v. Hurd*, 6 Pick. 356. See *Southworth v. Smith*, 7 Cush. 393. In case of a tender of specific articles the tender is not sufficient, unless the articles are so designated and set apart as to enable the creditor to identify them. *Deweese v. Lockhart*, 1 Texas, 535.]

(z) *Alexander v. Brown*, 1 C. & P. 288.

produce it, the plaintiff saying he could not take it; the court was of opinion that this was a good tender. (a) And it seems, that if the debtor express his willingness to pay a certain sum, and state that he has it in the house, and offer to go and fetch it; but is prevented by the creditor stating that the debtor need not trouble himself, for it could not be taken, this will support a plea of tender. (b)

A., having goods at a pawnbroker's, delivered the duplicate to B., to take them out of pledge. B. took them out accordingly, and paid the amount due on them. On A. sending to B. for the goods, and stating that B. might have the money if he would deliver them up, B. said he had not got them, and refused to tell who had them; and the court held, in trover by A. against B. that the latter was not entitled to a tender of the money he had advanced; because A., even if he had made a tender, would not have had the goods delivered to him. (c)

But where the production of the money was prevented, by the creditor leaving the room after the debtor had offered to pay it, and whilst he was in the act of taking it from his pocket, Lord Tenterden C. J. thought there was not a sufficient tender. (d) When not.

So where, to establish a tender, the defendant proved that he and a friend went to the plaintiff's attorney, and said that he had come to settle the plaintiff's account; that he produced a paper containing a statement of the account, in which he made the balance 5*l.*, which, he said, he was ready to pay, but produced no money or notes; and that the plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.*; Lord Kenyon held that the tender was not sufficient. (e)

(a) *Finch v. Brook*, 1 Scott, 70.

(b) *Harding v. Davies*, 2 C. & P. 77, cor. Best C. J. who observed, that "it would not do, if a man said, I have got the money, but must go a mile to fetch it."

(c) *Jones v. Cliff*, 1 C. & M. 540.

(d) *Leatherdale v. Sweepstone*, 3 C. & P. 342. [If a person, who is bound to pay money, be prevented from making a tender by any contrivance or evasion of the party to whom the money is to be paid, it will be equivalent to a tender, or a sufficient excuse for not making it. *Gilmore*

v. Holt, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 393; *Borden v. Borden*, 5 Mass. 74; *Tasker v. Bartlett*, 5 Cush. 359; *Sands v. Lyon*, 18 Vt. 18; *Hazard v. Loring*, 10 Cush. 267. But a bare refusal to receive the sum due, and a demand of a larger sum, is not enough to excuse the actual tender of the money. *Dunham v. Jackson*, 6 Wend. 22.]

(e) *Dickinson v. Shee*, 4 Esp. 68. See *Bac. Abr. Tender* (B. 1); [*Knight v. Abbott*, 30 Vt. 577.]

The defendant left with his clerk 10*l.* for the plaintiff. The plaintiff called, and demanded 16*l.* The clerk told the plaintiff that the defendant was from home, and had left 10*l.* with him, to give the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor anything less than his whole demand. The clerk did not offer the 10*l.*; and the court, on that ground, held that there was no legal tender. (*f*)

The defendant ordered A. to pay the plaintiff 7*l.* 12*s.* The latter demanded 8*l.*; on which A. said, that he was only ordered to pay the former sum, which was in B.'s hands. B. put his hand to his pocket to take out the money; but, by A.'s desire, he did not do so. At the trial, B. could not say whether he had sufficient money about him, on the above occasion, to pay the 7*l.* 12*s.*; but swore that he had it in his house, at the door of which he was standing at the time. And the court held, that this was not a valid tender. (*g*)

Further: a tender, to be good, must not be made upon any condition to which the creditor has a right to object. (*h*)
 Thus, although a party who tenders money has a right to exclude any presumption against himself, that the sum tendered is in part payment of the debt; yet if he add a condition, that the party who receives the money shall acknowledge that no more is due, this will invalidate the tender. (*i*) And, accordingly, it has been held, that an offer to pay a sum of money, "if the plaintiff," who claimed a larger sum, "would accept it as the whole balance really due," is not a legal tender. (*k*)

Upon the same principle, a tender of money as "all that was due;" (*l*) and a tender of a sum "in payment of the half year's rent due at Lady Day last," (*m*) have been held bad. (*m*¹) So, a

(*f*) *Thomas v. Evans*, 10 East, 101.

(*g*) *Kraus v. Arnold*, 7 Moore, 59.

(*h*) *Per Maule B. Bevens v. Rees*, 5 M. & W. 306, 309. [A tender should be unconditional and of a certain and definite character. *Eastland v. Longshorne*, 1 Nott & McCord, 194; *Wood v. Hitchcock*, 20 Wend. 47; *Brooklyn Bank v. De Grauw*, 23 Ib. 342; *Loring v. Cooke*, 3 Pick. 51; *Robinson v. Bachelder*, 4 N. H. 40; *Brown v. Gilmore*, 8 Greenl. 110; *Hepburn v. Auld*, 1 Cranch, 321; *Bacon v. Conn*, 1 Sm. & M. Ch. 348; *Buffum v. Buffum*, 11 N. H. 451; *Richardson v.*

Boston Chemical Laboratory, 9 Met. 42, 52.]

(*i*) *Per Erle J. Bowen v. Owen*, 11 Q. B. 131, 136.

(*k*) *Evans v. Judkins*, 4 Camp. 156; *Strong v. Harvey*, 3 Bing. 304; *Mitchell v. King*, 6 C. & P. 237.

(*l*) *Sutton v. Hawkins*, 8 C. & P. 259.

(*m*) *Marquis of Hastings v. Thorley*, Ib. 573.

(*m*¹) [If a debtor tender to his creditor a sum of money, in full for all legal claims which the creditor may have against him upon account, and the creditor receive the

tender of a quarter's rent, coupled with a demand of a receipt to a particular day, — the contest being, whether rent was due for one or two quarters, — was held not to be good. (*n*) And so, where the tender was made in these terms: "I offer you 7*l.* 16*s.* 8*d.* as the balance of 35*l.*, and I demand a receipt in full," it was held to be invalid. (*o*)

So, it has been held, that the debtor, on making a tender, must not insist upon having a stamped receipt for the money, as a *condition* of his paying it. (*p*) But the correctness of this opinion has been doubted. (*q*)

What amounts to a conditional tender.

And where a debtor made a tender to his creditor, by sending him a check inclosed in a letter and requesting a receipt in return; this was held not to invalidate such tender. (*r*)

So where the agent of A. delivered to B. the following letter: "I have sent with the bearer 26*l.* 5*s.* 7½*d.* to settle one year's rent of N.;" and, on doing so, the agent said that he had the money with him to pay; but B. refused to take it, saying that there was more due to him; it was held that this was a sufficient tender. (*s*) So, where the person who made the tender said to the plaintiff, "I am come with the amount of your bill;" and the plaintiff said, "I shall not take it, it is not my bill;" the tender was held to be sufficient. (*t*) And where the defendant, on tendering the money, said, that "it was all he considered due;" this was held not to vitiate such tender. (*u*)

So a tender of so much money "under protest" is not a conditional tender. (*x*)

And so, if the condition be one to which the creditor has no

money protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit upon the account, and the debtor do not express any dissent to this course, the acceptance of the tender will be no bar to the creditor's right to recover such sum as may be found due to him, exceeding the amount of the tender. *Gassett v. Andover*, 21 Vt. 342.]

(*n*) *Finch v. Miller*, 5 C. B. 428.

(*o*) *Ford v. Noll*, 2 Dowl. N. S. 617. [Where the defendant tendered a certain sum and demanded a receipt in full of all demands, which the plaintiff refused to give, and thereupon the tender was withdrawn, it was held, that the defendant had lost all benefit of the tender. *Thayer v.*

Brackett, 12 Mass. 450; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42, 52. See *Loring v. Cooke*, 3 Pick. 48; *Wood v. Hitchcock*, 20 Wend. 47.]

(*p*) *Cole v. Blake, Peake*, 110; *Laing v. Meader*, 1 C. & P. 257; per Cur. Smith *v. Goodwin*, 1 N. & M. 373.

(*q*) See *Richardson v. Jackson*, 8 M. & W. 298.

(*r*) *Jones v. Arthur*, 8 Dowl. 442.

(*s*) *Bowen v. Owen*, 11 Q. B. 131.

(*t*) *Henwood v. Oliver*, 1 Q. B. 409.

(*u*) *Robinson v. Ferreday*, 8 C. & P. 752.

(*x*) *Scott v. Uxbridge &c. Railway Co.* L. R. 1 C. P. 596; *Manning v. Lunn*, 2 C. & K. 13.

right to object; *e. g.* if the condition were, "I will pay the money if you will take it up," or the like, this will not invalidate the tender. (*y*)

And, in some cases, the question as to whether a tender was made conditionally, is one entirely for the jury. (*z*)

The common law requires that a tender shall be made in the current coin of the realm; (*a*) or in foreign money legally made current by proclamation. (*b*)

And by 3 & 4 Will. 4, c. 98, s. 6, "a tender of a note or notes of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender, to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums *above five pounds*, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin; provided always, that no such note or notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said governor and company; but the said governor and company are not to become liable or be required to pay and satisfy, at any branch bank of the said governor and company, any note or notes of the said governor and company not made specially payable at such branch bank; but the said governor and company shall be liable to pay and satisfy at the Bank of England, in London, all notes of the said governor and company, or of any branch thereof."

But even at common law, a tender in Bank of England notes, (*c*) or in provincial or country bankers' notes, (*d*) or by a draft or check on a banker, (*e*) is valid, if the creditor do not, at the time, object to receive such notes or

(*y*) Per Maule B. *Bevans v. Rees*, 5 M. & W. 306, 309.

(*z*) *Eckstein v. Reynolds*, 7 A. & E. 80; *Marsden v. Goode*, 2 C. & K. 133.

(*a*) A tender of more than 40s. in *silver*, is not good. See 56 Geo. 3, c. 68, s. 12.

(*b*) Bac. Abr. Tender (B. 2); Wade's case, 5 Co. 114; Case of Mixed Moneys, Davys, 18. [Bank bills are not cash, and cannot be tendered as such; *Coxe v. State Bank at Trenton*, 3 Halst. 72; *Moody v. Mahurin*, 4 N. H. 296; *Donaldson v. Benton*, 4 Dev. & Batt. 435; even to the bank

which issued them; *Hallowell & Augusta Bank v. Howard*, 13 Mass. 235; *Coxe v. State Bank at Trenton*, 3 Halst. 72. A plea of tender is not supported by proving an offer of a promissory note due from the plaintiff to the defendant. *Cary v. Bancroft*, 14 Pick. 315; *Bellows v. Smith*, 9 N. H. 285.]

(*c*) *Grigby v. Onkes*, 2 B. & P. 526; *Wright v. Reed*, 3 T. R. 554; Eq. Ca. Ab. 319.

(*d*) *Polglass v. Oliver*, 2 C. & J. 15.

(*e*) *Jones v. Arthur*, 8 Dowl. 442; *Tidd*,

check as a payment, on account of their *quality*, but object to the *amount* only. (*e*¹)

And it must be borne in mind, generally, that the creditor's conduct at the time of the tender may, in any case, deprive him of the right to object thereto. Thus if, at the time the tender is made, the creditor objects to it simply on the ground of the insufficiency of the amount tendered, he cannot afterwards object to it on account of anything in the mere form of the tender. (*f*)

7. The principle of the plea of tender is, that the defendant has always been ready — *toujours prêt* — to perform, entirely, the contract on which the action is founded; and that he did perform it, as far as he was able, by tender-
Effect of a prior or subsequent demand.
 ing the requisite money, — the plaintiff himself having precluded a complete performance, by refusing to accept it. (*g*) And therefore, if the plaintiff can show, that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea, whether such demand and refusal took place before or after the tender. (*h*)

And a subsequent application to, and refusal by one of two joint debtors; is sufficient for this purpose. (*i*)

9th ed. 187, note (*m*), citing *Wilby v. Warren*, Sit. Mid. M. T. 28 Geo. 3, K. B. cor. Buller J.

(*e*¹) [*Towson v. Havre de Grace Bank*, 6 Har. & J. 53; *Brown v. Dysinger*, 1 Rawle, 408; *Ball v. Stanley*, 5 Yerger, 199. Bank-notes are considered a good tender, unless objection is made to them on that account. *Snow v. Perry*, 9 Pick. 542; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Wheeler v. Knaggs*, 8 Ohio, 169; *Warren v. Maines*, 7 John. 476; *Cockerill v. Kirkpatrick*, 9 Mis. 697; *Williams v. Barr*, 7 Mis. 556; *Seawell v. Henry*, 6 Ala. 226; *Noe v. Hodges*, 3 Humph. 162. A clerk of the plaintiff to whom a legal tender may be made, may waive any objection to the validity of the tender on the ground of its being in *bank bills* and not in specie, either expressly or by implication. *Hoyt v. Byrnes*, 2 Fairf. 475. If before the day

of payment the party to whom payment is due agree to accept bank bills, it is a waiver of a tender in gold and silver, and the bank bills having been tendered, it is competent evidence to support an allegation of tender. *Warren v. Maines*, 7 John. 476. Treasury notes issued under the act of congress of 1814, being by their terms receivable in payment of duties, taxes, and land debts due to the United States, for the principal and interest due thereon, were a good tender, and might be pleaded as such to such debts. *Thorndike v. United States*, 2 Mason, 1.]

(*f*) *Richardson v. Jackson*, 8 M. & W. 298; *Bull v. Parker*, 2 Dowl. N. S. 345.

(*g*) *Per Cur. Dixon v. Clark*, 5 C. B. 365, 377.

(*h*) *Ib.*; 1 Wms. Saund. 33 b, note (2) *Bul. N. P.* 156.

(*i*) *Peirse v. Bowles*, 1 Stark. 323.

Nor is it in all cases necessary, that such demand and refusal should have been of the precise sum tendered. (*i*¹)
 When the demand may be of more than was tendered. Thus, if a sum of money be due on an entire contract, and the creditor demand the whole sum originally due thereon, and payment thereof be refused; a subsequent tender of part thereof is bad, notwithstanding that, by part payment or otherwise, the debt may have been reduced, in the interim, to the sum tendered. (*k*)

But if the amount demanded were made up of the sum due under the contract on which the action is brought, and of some other debt due from the defendant to the plaintiff, the fact of there having been a demand and refusal of such larger sum, will not invalidate a tender of the sum actually due on such contract. (*l*) This latter principle, however, would seem to apply only where the larger sum is demanded generally; for if it were explained to the defendant, at the time, how the amount demanded was made up, the transaction would then amount to a simultaneous demand of the several debts, so as to negative the averment of *toujours prist* as to each. (*m*)

But it appears that if the plaintiff replies, alleging a prior or subsequent demand and refusal of the *precise* sum stated to have been tendered to, and refused by him; proof that he demanded and was refused payment of a larger sum, will not support such replication. (*n*) And accordingly where, to an action on a bill of exchange for 10*l.* 4*s.*, accepted by the defendant, the defendant pleaded a tender of 4*l.* 7*s.* 6*d.*, and the plaintiff replied a *prior demand of that sum*; but the only proof of such demand was, that the bill was presented for payment when due, and was dishonored; the court held, that the proof did not support the issue, as the plaintiff proved no demand of the precise sum tendered. (*o*)

And a demand and refusal will not defeat a tender, unless such demand be made by some person who has authority to receive the money for the creditor, and to give the debtor a discharge. Although, therefore, it appears,
 By whom the demand must be made.

(*i*¹) [But see Thetford *v.* Hubbard, 22 Vt. 440.] Dixon *v.* Clark, 5 C. B. 365, overruling Tyler *v.* Bland, 9 M. & W. 338.

(*k*) Dixon *v.* Clark, 5 C. B. 365; (m) Dixon *v.* Clark, 5 C. B. 365, 378.
 Searles *v.* Sadgrave, 5 E. & B. 639; (n) Coore *v.* Calloway, 1 Esp. 115, 116;
 Cotton *v.* Godwin, 7 M. & W. 147. Spybey *v.* Hide, 1 Camp. 181. See Fabian

(*l*) Brandon *v.* Newington, 3 Q. B. 915; *v.* Winston, Cro. Eliz. 209.
 Hesketh *v.* Fawcett, 11 M. & W. 356; (o) Rivers *v.* Griffith, 5 B. & Ald. 630.

that a demand by the plaintiff's attorney is sufficient, yet a demand by the clerk of the attorney is not. (*p*)

But it seems that, after a tender has been made, the creditor cannot defeat its effect, by a subsequent application for the money *by letter*; but that a *personal* demand should ^{Not by letter.} be made on the debtor, to give him, at the time of the demand, an opportunity of paying the debt. (*q*) And at all events, if the demand were made at the debtor's residence during his absence, it would be necessary to defer issuing the writ, until the debtor had had reasonable time and opportunity to pay the money. (*r*)

8. A defendant cannot plead the general issue, (*s*) or any other plea, to the whole declaration, and a tender as to part; ^{Pleadings,} the rule being, that no other plea than that of tender ^{&c.} can be pleaded as to the sum alleged to have been tendered. (*t*) There would indeed be a gross incongruity if the rule were otherwise; for, upon the plea of tender, the defendant expressly admits the sum tendered to be due, and brings it into court to be paid to the plaintiff.

And, accordingly, if the defendant intend altogether to deny the contract and facts stated in any particular count, a tender should not be pleaded thereto. (*u*)

The plea must aver that the defendant is, and always has been, ready to pay, from the time the money was payable; ^{Plea.} and it is not sufficient merely to show a tender upon a certain day, and a subsequent readiness to pay the money. (*x*) So, the plea will be bad in substance, if it do not allege an actual ten-

(*p*) Coore *v.* Calloway, 1 Esp. 115, 116; Goodland *v.* Blewith, 1 Camp. 478, note.

(*q*) Edwards *v.* Yeates, R. & M. 360; but see Hayward *v.* Hague, 4 Esp. 93.

(*r*) Gibbs *v.* Stead, 8 B. & C. 528.

(*s*) See Plea &c. Chit. jun. Pl. 3d ed. 521.

(*t*) Dowgall *v.* Bowman, 3 Wils. 145; S. C. 2 Bl. 723; Maclellan *v.* Howard, 4 T. R. 194; 1 Wms. Saund. 33 c, note.

(*u*) Cox *v.* Brain, 3 Taunt. 95. [See Jones *v.* Hoar, 5 Pick. 285; Huntington *v.* American Bank, 6 Pick. 340; Hubbard *v.* Knous, 7 Cush. 556; Bacon *v.* Charlton, 7 Cush. 581; Schreger *v.* Carden, 11

C. B. 851. A tender of the balance which the other party claims to be due on book account, is a recognition and acknowledgment of that sum as the true balance, and if accepted, is conclusive upon both parties, and will bar any recovery by either, for any items of account which were previously matters of dispute between them. Draper *v.* Pierce, 29 Vt. 250.]

(*x*) See Dixon *v.* Clark, 5 C. B. 365, 377; Giles *v.* Hart, Salk. 622; Hume *v.* Peplow, 8 East, 168; [Besancon *v.* Shirley, 9 Sm. & M. 457; Lanier *v.* Trigg, 6 Sm. & M. 641.]

der of the money, even although it contain a *profert in curiam* thereof. (y)

But the plea will not be bad if it allege a tender of the sum to which it is pleaded, although other pleas which are on the record may make it uncertain whether the defendant does not, in fact, admit that, at the time of the tender, there was a larger sum due, in respect of the debt to which the tender is pleaded. (z)

The sum stated in the plea to have been tendered is material and traversable ; and care should therefore be taken that the exact sum offered be set forth therein.

So it should be pleaded, that the tender was made "before the commencement of the suit." (z¹)

And the plaintiff may sign judgment for the amount to which the tender is pleaded, if the sum tendered be not paid into court. (a)

The plaintiff, in his replication, may either deny the tender, and under this traverse contest its formality ; or admit the tender, and proceed for a larger sum ; or the replication may set up a prior or subsequent demand and refusal. (b)

And the plaintiff may take out of court the money which has been paid in on the plea of tender, even although he reply, denying the tender. (c) But if he permit the money to remain in court, and a verdict pass for the defendant, the court will retain it to secure the defendant's costs. (d)

Where, to an action for use and occupation, work and labor, &c., alleging a single promise and breach, there were several pleas as to all but 7*l.* parcel, &c. ; and as to 7*l.* a single plea of tender ; and the pleas did not distinguish the counts ; it was held, that proof of a single tender of 7*l.*, in respect of the claim for use and occupation, satisfied the plea of tender. (e)

(y) *French v. Watson*, 2 Wils. 74. [A plea of tender before suit brought must contain a *profert in curiam* of the money tendered, and must be pleaded in bar of the damages ultra, &c., and not in bar of the action. *Ayres v. Pease*, 12 Wend. 393 ; *Curley v. Vance*, 17 Mass. 389 ; *Claflin v. Hawes*, 8 Mass. 261 ; *Crawford v. Harvey*, 1 Blackf. 383 ; *Jarboe v. McAtee*, 7 B. Monroe, 279 ; *Sheriden v. Smith*, 2 Hill, 538 ; *Earle v. Earle*, 1 Harr. 273.]

(z) *Jones v. Owen*, 5 A. & E. 222.

(z¹) [Where it is necessary for the plain-

tiff to allege and prove a tender of performance, a day on which the alleged tender was made must be averred. *Vance v. Blair*, 18 Ohio, 532.]

(a) *Chapman v. Hicks*, 2 C. & M. 633 ; *Pether v. Shelton*, 1 Str. 638.

(b) See ante, 1197 ; Form, Chit. jun. Pl. 3d ed. 521, 522.

(c) *Le Grew v. Cooke*, 1 B. & P. 332. See Bac. Abr. Tender, 1.

(d) 1 Wms. Saund. 33 b, note (2).

(e) *Robinson v. Ward*, 8 Q. B. 920.

If the issue on the plea of tender be found for the plaintiff, and that on *non assumpsit* for the defendant, the plaintiff is, ^{Costs.} it seems, entitled to the general costs of the cause, (*f*) — the defendant being entitled to the costs of the issue found for him. (*g*)

[9. Tender of Specific Articles on a Contract for their Delivery.

A tender of chattels, differs generally, both in mode and effect, from a tender in money. (*h*) And chattels themselves require different modes of tender according to their character, — as light and easily portable, (*i*) or heavy, bulky, and cumbrous, — and the terms of the contracts, under which they are agreed to be delivered. (*k*)

A note payable in chattels, with no designation of time or place, is payable only on a *special demand*, and it should be demanded at the place where the property is kept. The store of the merchant, the shop of the manufacturer or mechanic, and the farm, barn, or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay on demand and is silent as to the place. (*l*) This rule may, however, be controlled by circumstances

No time or place designated, special demand necessary, and where to be made.

(*f*) *Hibbert v. Fox*, 5 Taunt. 160.

(*g*) See 15 & 16 Vict. c. 76, s. 81.

(*h*) *Mellen C. J. in Wyman v. Winslow*, 2 Fairf. 401; *Carley v. Vance*, 17 Mass. 389; *Southworth v. Smith*, 7 Cush. 391; *Borden v. Borden*, 5 Mass. 67, 74. After a tender of specific articles it is not necessary, as in case of a tender of money, for the debtor to have the property always ready. A tender of the former vests the title in the specific property. A tender of money does not. *McConnell v. Hall*, *Brayt.* 223. See *Hayes v. Thom*, 28 N. H. 386, 400; *Curtiss v. Greenbanks*, 24 Vt. 536, 541; 2 Kent, 508, 509; *Lamb v. Lathrop*, 13 Wend. 95.

(*i*) In *Barr v. Myers*, 3 Watts & S. 295, the chattels to be delivered were 2,000 mulberry trees then growing in the ground. They were to be taken up on or before a certain date in the fall for delivery, and to be transplanted in the spring. Being of small size and weight, they were regarded as coming under the head of portable ar-

ticles. See, also, 2 Kent, 507; 2 Greenl. Ev. § 609.]

(*k*) *Stone v. Gilliam*, 1 Shower, 149; 2 Kent Com. 508. In *Roberts v. Beatty*, 2 Penn. 65, *Ross J.* said: "We must consider the subject-matter of the agreement, the object of making it, the sense in which the parties mutually understood it at the time it was made, the place where it was entered into, the use to which any articles stipulated to be delivered were to be applied, if materials for building, when and where to be used, and finally the practical exposition, and the general understanding, custom, and usage among those who enter into similar contracts, in the execution and performance." See *Dunn v. Marston*, 34 Maine, 381, 382.

(*l*) *Miles v. Roberts*, 34 N. H. 254; *M'Killip v. M'Killip*, 8 Barb. 552; *Lobdell v. Hopkins*, 5 Cowen, 518; *Barr v. Myers*, 3 Watts & S. 295; *Bronson v. Gleason*, 7 Barb. 472; *Vance v. Bloomer*, 20 Wend. 196; *Rice v. Churchill*, 2 Denio, 145;

[showing that a different place was intended by the parties. (*m*)

Rule may be controlled by circumstances.

As where goods are the subject of general commerce, and are bought to be reshipped, and no place of delivery is named, and the purchaser resides at the place of reshipment, and has there a dock and storehouse, where goods have before been delivered by the vendor, a different rule seems to prevail; and in such a case, it was held, that the dock of the purchaser was the place of the delivery, under a contract "to sell him one boat-load of salt per week, and deliver the same in good order to him," &c. (*n*) So, where a quantity of corn was sold to a miller, and no place of delivery was fixed, and a part of the corn was delivered at the mill of the purchaser, that was held to be the place of delivery. (*o*)

Goodwin v. Holbrook, 4 Wend. 380; 2 Kent, 505; *Mountjoy v. Adair*, 1 Smith, 96; *Bosworth v. Frankberger*, 15 Ill. 508; *Dunn v. Marston*, 34 Maine, 379, 382. The creditor is to elect the time for making the demand. *Cowen J. in Vance v. Bloomer*, 20 Wend. 198; *Lobdell v. Hopkins*, 5 Cowen, 517, 518; *Dunn v. Marston*, 34 Maine, 380; *Rice v. Churchill*, 2 Denio, 148, 149. The reason of the above rule is, that the party to receive is to be the actor by going to demand the articles; and till then the other party is not in default by omitting to tender them. *Sargeant J. in Barr v. Myers*, 3 Watts & S. 299; 2 Greenl. Ev. § 610; 2 Kent, 508. See, also, *McMurray v. The State*, 6 Ala. 326; *Chambers v. Winn*, Prin. Dec. Kentucky, Hardin, 80, note; *Dandridge v. Harris*, 1 Wash. 328; *Middlesex Co. v. Osgood*, 4 Gray, 447. In *Chase v. Flanders*, 2 N. H. 417, the contract was to deliver to the creditor a quantity of staves upon a certain turnpike road, one half in two months, if demanded, and one half in six months, if called for; it was held, that the turnpike extending several miles, was not a particular place; but that the staves were to be delivered at some place on the turnpike, whenever requested after the time specified. A. agreed to deliver to B. a boat-load of corn at Louisville as soon as his boat could be brought there. In the absence of any custom applicable to the case, the place of delivery would be A.'s

boat when moored at Louisville. *Applegate v. Hogan*, 9 B. Mon. 69.

(*m*) The contract is to be considered in connection with its attendant circumstances, and the place of delivery is to be inferred from the nature of the contract, and of the articles to be delivered, from the situation of the parties, and from any other circumstances from which the court may reasonably infer the intent of the parties. Whatever may be thus reasonably inferred may be regarded as inserted in the contract. *Miles v. Roberts*, 34 N. H. 253.

(*n*) *Bronson v. Gleason*, 7 Barb. 472. Where a contract was to deliver chattels on demand, it was said that the demand need not of necessity be made at the place where they were to be received. *Higgins v. Emmons*, 5 Conn. 76. See *Rice v. Churchill*, 2 Denio, 145. In *Slingerland v. Morse*, 8 John. 474, the time of the delivery was fixed but not the place. The debtor tendered the property (being cumbersome) at the place where it was, but the creditor refused to receive it there, and then appointed another place, but the property not being delivered there, he brought an action on the contract, which was to deliver the property or pay a certain sum of money. The tender was held to bar the action, and the creditor was left to resort to the specific articles tendered.

(*o*) *Field v. Runk*, 2 N. Jer. 525. See *Kraft v. Hurtz*, 11 Mis. 109. Where the

[If a day certain is fixed, on or before which portable (*p*) chattels are to be delivered, such as cattle, grain, salt, and the like, but the place is not fixed nor inferable from collateral circumstances, (*q*) the creditor's place of residence, at the date of the contract, will be understood as the place of delivery, and the debtor must seek him there. (*r*)

Day fixed
for delivery
of portable
chattels,
where to be
delivered.

If the articles are not portable, but cumbrous and bulky, and there is nothing in the contract or circumstances to fix the place, then the debtor, if desirous of paying, must seek the creditor, if within the state, and request him to appoint one, a reasonable time before the day of delivery, as it is, in this event, the creditor's privilege to name a reasonable and suitable

Cumbrous
articles.

intention of the parties, as to the place of delivery, can be collected from the contract and the circumstances proved in relation to it, the delivery should be made at such place, although the condition of the place named in the contract may have been changed after the making of the contract. As, if the contract designate a store, and it should be changed into a workshop, and be occupied by the same person, there could be little doubt respecting the intention. *Howard v. Miner*, 20 Maine, 325, 330.

(*p*) Portable chattels are such as may be conveniently carried from place to place, and are obviously by their nature adapted to that mode of transportation. See *Barr v. Myers*, 3 Watts & S. 295; 2 Greenl. Ev. § 609; *Currier v. Currier*, 2 N. H. 75.

(*q*) See *Barker v. Jones*, 8 N. H. 413. Parol evidence was admitted to show a place of delivery, agreed upon by the parties at the making of the contract, and afterwards, in a case where no place was fixed upon in the written contract. *Muselman v. Stoner*, 31 Penn. St. 265; *Wyman v. Winslow*, 2 Fairf. 398; *Miles v. Roberts*, 34 N. H. 245. But see *La Farge v. Rickert*, 5 Wend. 187. So, it may be proved by parol, that after the contract, the parties enlarged the time for delivery. *Robinson v. Batchelder*, 4 N. H. 40.

(*r*) 2 Kent, 507; 2 Greenl. Ev. § 609; *Goodwin v. Holbrook*, 4 Wend. 377;

Barr v. Myers, 3 Watts & S. 299; *Lobdell v. Hopkins*, 5 Cowen, 516; *Roberts v. Beatty*, 2 Penn. 71; *Wilmouth v. Patten*, 2 Bibb, 280; *Chipman Cont.* 29, 30; *La Farge v. Rickert*, 5 Wend. 187. "If the property is portable, it must be taken to the creditor and delivered to him, or at his residence." *Ross J.* in *Roberts v. Beatty*, *ubi supra*; *Miles v. Roberts*, 34 N. H. 254. It is said by Mr. Chancellor Kent, that "the common law on the subject of the delivery of specific articles which are portable, makes a distinction between the contract of sale, and the contract to pay a debt at another time in such articles. In the contract of sale the delivery is to be made at the place where the vendor has the article, but in the other case the weight of authority would seem to be in favor of the rule, that the property is to be delivered at the creditor's place of residence, though the cases on the subject are not easily reconcilable with each other." 2 Kent, 506. But in *Barr v. Myers*, 3 Watts & S. 295, where the articles were to be delivered under a contract of sale, Sargeant J. said: "I am not aware of any decided case which makes a distinction, where a time is stipulated for the delivery of articles, between a contract of sale and delivery and a contract to pay a debt in certain articles; nor do I perceive the ground of such distinction." P. 299. See *Borah v. Curry*, 12 Ill. 66.

[place. (s) And if the creditor names such a place, it is the duty of the debtor to deliver there; but if he refuses or neglects to name any place, or names an unreasonable one, or if the creditor avoids the debtor and prevents his making the request to appoint a place, the debtor may himself appoint a place and deliver the chattels there. (t) In such case, the debtor must appoint a place which circumstances shall show to be suitable and convenient for the purpose intended, and such as might fairly be inferred to have been in contemplation of the parties when the contract was made, (u) and shall give the creditor previous notice thereof if practicable; (x) and a tender at such place would be good. (y)

Under a contract to deliver chattels at a specified place, other than the residence of the creditor, it is the duty of the debtor, after making the delivery at that place, in a case where the creditor has a right to object to the quality of the articles, to notify the creditor thereof without delay, and until such delivery and notice, the title cannot pass. (z)

Contract to deliver chattels at a specified place, debtor to notify creditor that he has delivered, &c.

In cases where the debtor is bound to seek and to notify the

(s) *Barr v. Myers*, 3 Watts & S. 299; *Co. Litt.* 210 b; *Roberts v. Beatty*, 2 Penn. 71; *Goodwin v. Holbrook*, 4 Wend. 377; 2 Kent, 507; *Howard v. Miner*, 20 Maine, 325, 330; *Aldrich v. Albee*, 1 Greenl. 120; *Bixby v. Whitney*, 5 Greenl. 192, 195; 2 Greenl. Ev. § 610; *Mallory v. Grant*, 4 Chandler (Wis.), 143; *Barnes v. Graham*, 4 Cowen, 452; *Mingus v. Pritchett*, 3 Dev. 78; *La Farge v. Rickert*, 5 Wend. 187, 190; *Miles v. Roberts*, 34 N. H. 254; *Musselman v. Stoner*, 31 Penn. St. 265. In *Howard v. Miner*, *ubi supra*, *Shepley J.* said: "If the debtor be desirous of paying, he should request the creditor to appoint a place, or deliver to him in person at a proper one." See *Vance v. Bloomer*, 20 Wend. 197, 198; *Aldrich v. Albee*, 1 Greenl. 123. The readiness of the debtor in such case, to pay at his own dwelling-house, on the day appointed, is no defence. *Bean v. Simpson*, 16 Maine, 49, 51; *Bixby v. Whitney*, 5 Greenl. 192.

(t) *Howard v. Miner*, 20 Maine, 325; 2 Greenl. Ev. § 610; 2 Kent, 507, 508; *Chipman Cont.* 27; *Aldrich v. Albee*, 1

Greenl. 120; *Miles v. Roberts*, 34 N. H. 254, 255. This same principle seems to have been acted on where the creditor, having a right to select the articles he wanted, neglected to do so. *Gilbert v. Danforth*, 2 Selden (N. Y.), 585.

(u) 2 Kent, 507, 508.

(x) 2 Greenl. Ev. § 610.

(y) *Peck v. Hubbard*, 11 Vt. 612. In this case it was held, that if a note be payable in chattels at a fixed time, at such place as the creditor shall elect, if no election is made by him in a reasonable time, to enable the debtor to pay the note before the time of payment elapses, the debtor may elect his own place of payment, and notify the creditor, and a tender at such place would be good. And it was also held, that the election of a place of payment by the creditor, in such case, is not a condition precedent, but a mere privilege, which, if not exercised within a reasonable time, is waived. See, also, *Gilbert v. Danforth*, 2 Selden (N. Y.), 585.

(z) *Newcomb v. Cramer*, 9 Barb. 402.

[creditor, he is not obliged to follow him out of the country or state for this purpose. A reasonable effort to ascertain the residence of the creditor and give him notice will be sufficient. (a) Where the creditor lived out of the state and in a foreign country, it was held, that his foreign residence did not absolve the debtor from the obligation of ascertaining from him the place where he would receive the goods, upon a note given to him for their delivery, no place of delivery having been assigned. (b)

Creditor out of the state or country.

And so, where the debtor or promisor resides in a foreign country, and the promise is made or the note given there, he is bound to ascertain from the creditor or promisee within the state at what place he will receive the articles promised. (c)

Debtor residing in a foreign country.

Where a contract is made for the payment of chattels, such as the creditor should select, at a place designated, but no time fixed for the payment, such chattels are payable on demand. (d) And where the place is not specially designated, but the contract is to pay in such articles as the creditor shall select from those which the debtor is manufacturing at a specified place, the legal inference is that the payment is to be made at the place thus specified. (e)

Contract to pay in such chattels as creditor should select.

(a) *Howard v. Miner*, 20 Maine, 325, 330; *Smith v. Smith*, 25 Wend. 405; *S. C. 2 Hill*, 351; *Bixby v. Whitney*, 5 Greenl. 192, 195; *Roberts v. Beatty*, 2 Penn. 71. In a case where a party gave a written promise, to pay a certain sum in one year for a clock, or interest on the sum, and the clock uninjured, and the writing purported to have been made at the town where the promisor resided, the promisee residing in another state; it was held, on the circumstances, that the place of performance was the house of the promisor, and that he had an election to pay the money, or deliver the clock and pay the interest. *Barker v. Jones*, 8 N. H. 413. It was also held, that no action could be sustained until after demand, or evidence that the promisee was ready to receive performance at the place, or that the defendant was unable to perform the contract.

But where a contract is made in one state for the payment of money, the debtor is not bound to go to another state to tender the money to the creditor. *Allshouse v. Ramsay*, 6 Wheat. 631.

(c) *White v. Perley*, 15 Maine, 470. In this case Emery J. said: "We make no more rigid construction against the defendant [the debtor], than has been made in such case against our own citizens where the creditor lives out of the United States. That circumstance does not absolve the debtor from ascertaining of the creditor where the goods shall be delivered."

(d) *Russell v. Ormsby*, 10 Vt. 274. And in such case, it seems, that the party agreeing to deliver them must have them always ready at the place. *Bailey v. Simonds*, 6 N. H. 159; *Mason v. Briggs*, 16 Mass. 453; *Rice v. Churchill*, 2 Denio, 145.

(b) *Bixby v. Whitney*, 5 Greenl. 192.

(e) *Dunn v. Marston*, 34 Maine, 379.

[If goods are to be furnished or supplied under a written contract or order, which does not specify any time at which they are to be delivered, the law implies a contract that they are to be furnished within a reasonable time. (*f*)

When by the contract chattels are to be delivered *on demand*, the law requires that a reasonable demand shall be made, and at the proper place. (*a*) The debtor should be ready, in such case, at all reasonable hours at the place of delivery. (*b*) But it is not necessary that the demand should be made upon the debtor in person. If he is absent from the place of performance, a demand of any one in charge, or, if there be no one in charge, then a public demand, at that place at a reasonable hour, will be sufficient. (*c*)

(*f*) *Crocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530; *Adams v. Adams*, 26 Ala. 272. What is a reasonable time within which the goods are to be delivered, or a contract is otherwise to be performed, where the contract is silent on the subject, is a question of law. *Attwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Maine, 164; *Howe v. Huntington*, 15 Maine, 350; *Kingsley v. Wallis*, 14 Maine, 57; *Murray v. Smith*, 1 Hawks, 41; *Cameron v. Wells*, 30 Vt. 633. And it is to be determined by a view of all the circumstances of the case. *Crocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, 530. And no parol evidence will be admitted to prove a specific time at which the goods were to be delivered, for that would be to vary and contradict the legal interpretation of the instrument. *Crocker v. Franklin Hemp & Flax Manuf. Co.* *ubi supra*. But parol evidence has been admitted to show what the party to be affected considered a reasonable time. *Coates v. Sangston*, 5 Md. 121. And so parol evidence of the conversations of the parties may be admitted to show what they thought to be a reasonable time for performing the contract. *Crocker v. Franklin Hemp & Flax Manuf. Co.* *ubi supra*.

(*a*) *Higgins v. Emmons*, 5 Conn. 76;

Rice v. Churchill, 2 Denio, 147; *Dunn v. Marston*, 34 Maine, 382. The facts that show a demand to have been reasonable, prove also that it was at the proper place. *Higgins v. Emmons*, *ubi supra*. On a note payable in ready-made clothing, the creditor has no right to demand a garment which has been made for a customer at a stipulated price; and on such a demand, the debtor is not bound to deliver or tender other clothing. *Vance v. Bloomer*, 20 Wend. 196. See *Buck v. Burk*, 4 Smith (N. Y.), 337. But it seems, that a creditor may demand a part of the clothing at a time, and in such parcels as may be most for his convenience. *Cowen J.* in 20 Wend. 200. So, as to this last point, it was held, in *Buck v. Burk*, 4 Smith (N. Y.), 337.

(*b*) *Mason v. Briggs*, 16 Mass. 453; *Rice v. Churchill*, 2 Denio, 145; *Bailey v. Simonds*, 6 N. H. 159; *Dunn v. Marston*, 34 Maine, 380.

(*c*) *Mason v. Briggs*, 16 Mass. 453; *Lobdell v. Hopkins*, 5 Cowen, 518, note; *Chipman Cont.* 28-30; *Rice v. Churchill*, 2 Denio, 148; *Dunn v. Marston*, 34 Maine, 380, 381. In *Mason v. Briggs*, the debtor was absent from the commonwealth, and the demand was made at his dwelling-house (that being the proper place), and of his wife.

[If the debtor is present and a reasonable demand is made upon him, his silence will be regarded as equivalent to a refusal to deliver. (*d*)]

Silence of debtor when demand is made.

Where a note is in the alternative, as, when it is given for the payment of a certain sum of money, within a certain time, payable in furniture or other specific articles, until the day of payment, the debtor has an election to pay either in money or such specific articles; but after the day of payment is past, his right of election is gone,

Note in the alternative, for a certain sum of money, payable in chattels.

(*d*) *Higgins v. Emmons*, 5 Conn. 76. In *Rice v. Churchill*, 2 Denio, 145, a note was given by one, who kept a saw-mill and lumber-yard, for an amount "payable in lumber at cash prices when called for," without any stipulation of time or place of payment; and this note was held payable on demand at the mill-yard. It was also held, that a special demand must be made there before suit brought. But a personal demand on the debtor elsewhere would be good, unless met by an offer to pay at the yard. In such case, the creditor would be bound to go to the yard to receive payment. *Scott v. Crane*, 1 Conn. 225; *Higgins v. Emmons*, 5 Conn. 76; *Dunn v. Marston*, 34 Maine, 379, 383. A public demand made at the yard would be sufficient, though neither the debtor nor any one authorized to make payment were found there. The creditor is not bound to go to the place of payment to make demand but once, nor is he bound to wait there till the debtor, if absent, returns. *Rice v. Churchill*, 2 Denio, 148; *Dunn v. Marston*, 34 Maine, 382, 383. Where a note was made payable in "legal services on demand," it was held, that no action could be brought on it, until a demand had been made, and the nature of the services required made known to the debtor. *Haskell v. Mathews*, 37 Maine, 541. The debtor, in such case, is not bound to remain in the place or vicinity, where the contract was made, for any period it may suit the creditor to wait, before he makes a demand for performance. Even the debtor's removal out of the state, after a reasonable time had elapsed in which the creditor might have

demand and received the services, would not make the promisor liable to an action on the contract, unless an occasion for such services were proved. But the creditor has a reasonable time in which he may require the services to be performed without unexpected expense or inconvenience to himself in obtaining it. *Haskell v. Mathews*, 37 Maine, 541. In *Buck v. Burk*, 4 Smith (N. Y.), 337, the defendant, a shopkeeper in New York City, agreed to pay a debt of \$2,000, in "merchandise out of my store, 44 Maiden Lane, on demand." *Selden J.* said: "The whole case turns upon the question, whether the obligation imposed upon the defendant by the note in question, to keep a stock of goods in the store in Maiden Lane, was perpetual, and one from which he could in no manner be relieved, until the plaintiff should see fit to call for payment, or until the statute of limitations should attach. This question is not without difficulty,—the terms of the note, if rigidly construed according to their literal import, would seem to impose such an obligation. But the law assumes, in many cases, to give to contracts a reasonable interpretation which, although it may slightly vary from the strict letter of the agreement, preserves, nevertheless, all the substantial rights of the parties." Having suggested several such cases, the learned judge added: "Assuming, as I do, therefore, that the mention of the store in Maiden Lane in the note was intended to designate a place of payment, I think that the principles and analogies to which I have referred, justify us in holding that the de-

[and the creditor's right to demand payment in money is absolute. (a)]

Delivery after expiration of time specified, if accepted or not dissented from, sufficient.

Where a party, having contracted to manufacture and deliver articles, at a specified time and place, delivers them after the expiration of the time, it will be a sufficient performance of the contract, if the other party agreed to the postponement, or accepted the articles, or, knowing of the delivery, did not dissent. (b)

defendant might terminate his obligation to pay at that particular place, by giving reasonable notice of his intention to remove his goods. The plaintiff can have no good reason to complain, after having had an entire year in which to call from time to time for the goods, that he is required either to make his selection from the stock of goods at the place provided in the contract before their removal, or consent to receive payment at some other place equally convenient." And it was held that, after a removal of the goods under such circumstances, a subsequent demand at the original place, or elsewhere, for delivery at the original place, was ineffectual. And it was also held, that, under the above contract, the defendant was at liberty to continue selling his goods, without replenishing the stock, until demand for a delivery in full of the contract; and that so long as he retained sufficient for that purpose, the other party could not complain that he was left to a selection from an inferior assortment, and goods less marketable than at the time of the contract.

(a) *Church v. Feterow*, 2 Penn. 301; *Choice v. Moseley*, 1 Bailey, 136; *Wiley v. Shoemaker*, 2 Greene (Iowa), 205; *Lawrence v. Dougherty*, 5 Yerger, 453; *Miller v. McClain*, 10 Yerger, 245; *Vanhooser v. Logan*, 3 Scam. 389; *Stewart v. Donnelly*, 4 Yerger, 177; *Plowman v. McLane*, 7 Ala. 775; *Heywood v. Heywood*, 42 Maine, 229; *Trowbridge v. Holcomb*, 4 Ohio (N. S.), 38. Where the time for payment is fixed by the contract, the payment is to be made on the day without

request. *Games v. Manning*, 2 Greene (Iowa), 251; but it is otherwise when the contract is payable on demand; in that case the creditor is to make a special demand. *Elkins v. Parkhurst*, 17 Vt. 105. If the debtor fails to pay in goods on a demand, when a demand is to be made, or on the day of payment, if a day is fixed, he then becomes liable to pay in money; *Mitchell v. Gregory*, 1 Bibb, 449, 452; *Shrewsbury v. Buckley*, 4 Bibb, 260; *Thomas v. Roosa*, 7 John. 461; unless there has been a tender of the goods at the proper time. *Hamilton v. Eller*, 11 Ired. 276; *Sorrell v. Craig*, 8 Ala. 576. *Grieve v. Annin*, 1 Halst. 461, shows that a tender of specific articles must be made on the day appointed, or the delinquent party will be liable to a suit without demand. *Elkins v. Parkhurst*, 17 Vt. 105. One undertakes to pay £20, or deliver twenty bales of wool; the debtor may pay either before the day; after the day, the creditor may demand the money. Bro. Abr. tit. Debt, pl. 159; *Grieve v. Annin*, 1 Halst. 465; *Roberts v. Beatty*, 2 Penn. 67. In this last case the note was payable in chattels, but no sum was named. See *Laidler v. Hawkins*, 2 H. & Gill, 277; *Lyles v. Lyles*, 6 Harr. & J. 273; *Vanhooser v. Logan*, 3 Scam. 390; *Hamilton v. Eller*, 11 Ired. 276. In an action on a note for a certain sum named, to be paid in rum, sugar, or molasses, at the election of the creditor, within eight days after date, it was held to be unnecessary to aver that the creditor had made his election, and given notice thereof to the debtor, because the debtor was bound, at all events,

(b) *Flagg v. Dryden*, 7 Pick. 52.

[Where the contract is entire, to deliver a certain quantity of chattels at a particular time, the debtor must tender the whole; if he tenders only a part, the creditor is not bound to receive it. (*d*)

Whole quantity to be tendered.

It sometimes happens that an act is to be done by the creditor, which necessarily precedes performance by the debtor, and in that case, the act of the creditor must be done in season to enable the debtor to complete his undertaking at the time agreed. Thus, where a contract is made payable in a certain time in labor, to be rendered on articles furnished by the creditor to be manufactured, such articles must be

When an act is to be done by creditor precedent to performance by debtor.

to pay in eight days in some one of the articles specified, and on failure to pay in any one of these articles within that time, he became liable in money. *Townsend v. Wells*, 3 Day, 327. But see, as to this, *Barker v. Jones*, 8 N. H. 413; *Gilbert v. Danforth*, 2 Selden (N. Y.), 585. In an action on a contract to pay a certain sum of money, in certain specified chattels, which the debtor has failed to discharge, he cannot show in mitigation of damages that the chattels bore a less value than the sum specified. *Grieve v. Annin*, 1 Halst. 461. See *Elkins v. Parkhurst*, 17 Vt. 105. In order to make an effectual tender the debtor must show himself ready to the last moment and uttermost convenient time of the day named, and at the proper place, with the goods specially set apart and designated. *Aldrich v. Albee*, 1 Greenl. 120, 123; *Rutland v. Hudson*, 1 Ld. Raym. 686; 2 Strange, 777; *Wade's case*, 5 Rep. 115; *Mingus v. Pritchett*, 3 Dev. 78; *Tiernan v. Rapier*, 5 Yerger, 410, 414, 415; *Savary v. Goe*, 3 Wash. C. C. 140; *Duckham v. Smith*, 5 Mon. 372; *Sweet v. Harding*, 19 Vt. 587. Any accident or inevitable necessity shall not excuse him; for he might have provided against that by his contract. *Harmony v. Bingham*, 2 Ker. (N. Y.) 107, 108; *Paradine v. Jane*, Aleyn, 27; *Roberts v. Beatty*, 2 Penn. 67. It is no valid excuse for not delivering goods of a certain quality, that goods of that quality were not to be had at the particular season when the contract by its terms was to be executed. *Gilpins v. Con-*

sequa, 1 Peters C. C. 91; *Youqua v. Nixon*, 1 Peters C. C. 221. When the time for payment in goods falls on Sunday, a tender on the Monday following is good. *Barrett v. Allen*, 10 Ohio, 426; *Delameter v. Miller*, 1 Cowen, 75; *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Sands v. Lyons*, 18 Conn. 18.

(*d*) *Roberts v. Beatty*, 2 Penn. 67, 70; *Cowen J. in Vance v. Bloomer*, 20 Wend. 200; *Russell v. Nicoll*, 3 Wend. 112. But the parties may, by consent, sever the contract, delivering and receiving part at a time. *Roberts v. Beatty*, *Vance v. Bloomer*, *ubi supra*. A party contracting for the sale and delivery of a large quantity of any particular item of merchandise (for instance, 500 bales of cotton), on its arrival at a particular port, is not bound to deliver a portion only of the article, the whole not having arrived. The vendee not being bound to receive, the vendor is not obliged to deliver a quantity less than the whole, the obligation being reciprocal. *Russell v. Nicoll*, 3 Wend. 112. If the creditor receives, accepts, and retains a part of the chattels, without objection that the whole are not delivered, he thereby disaffirms the entirety of the contract, and is liable to pay for the part he receives. *Roberts v. Beatty*, 2 Penn. 63; *Dula v. Cowles*, 2 Jones (N. C.), 454; *Bowker v. Hoyt*, 18 Pick. 555; *Wilkins v. Stevens*, 8 Vt. 214. A stricter rule prevails in New York against the debtor or vendor. See *Paige v. Ott*, 5 Denio, 406; *ante*, 617, 618, notes.

[furnished seasonably for the manufacture of them within the time assigned in the contract, otherwise the debtor would be discharged from all liability for the performance of such labor. (e)]

If a party receives and accepts the chattels to be delivered, before the day of payment, he holds them until that day to be then applied; and proof of a delivery and acceptance at the previous time will sustain an averment of delivery at the appointed time. (f) But the creditor is not bound to receive the chattels before the day of payment. (g)

Tender of chattels at the time and place agreed upon for delivery in payment of a debt, discharges contract and debt.

If the contract be to deliver specific articles at a certain time and place, in discharge of a previous debt, it is performed and the debt satisfied by a tender of the articles legally made at the time and place agreed, although the creditor did not attend to receive them; and no action on the contract can thereafter be maintained. (h)

A complete and effectual tender vests the title to the

(e) *Clement v. Clement*, 8 N. H. 210. See *v. Partridge*, 2 Duer (N. Y.), 463; *Downer v. Frizzle*, 10 Vt. 541. See *Savage Manuf. Co. v. Armstrong*, 19 Maine, 147; *Goodwin v. Holbrook*, 4 Wend. 377. But where a note was payable in chattels, to be delivered by the debtor at the residence of the creditor by a day named, a seasonable selection of the articles to be made by the creditor, and the latter made no selection, but prior to the time for payment instructed the debtor not to send any until he gave notice what he wanted, the debtor was held not to be thereby discharged from the contract. And it was further held that the creditor by such instructions and failure to select, did not lose *his right of selection*, unless the debtor, before such right was exercised, had paid the note in articles of his own selection; and also that, where such note remained, under such instructions, unpaid, for several years after it became due, and the creditor then selected or named the articles which he required in payment, and demanded them of the debtor, and the debtor did not comply with the request within a reasonable time, he would be liable on the contract for the amount in money. *Gilbert v. Danforth*, 2 Selden (N. Y.), 585.

(f) *Pierce v. Smith*, 25 N. H. 208.

(g) *Orr v. Williams*, 5 Humph. 423. See *Plowman v. McLane*, 7 Ala. 775; *Erwin v. Cook*, 2 Dev. 183. But a transfer of corporation stock, made to fulfil a contract, was held not to be ineffectual on account of its being made two days earlier than the stipulated day. *Dodge v. Barnes*, 31 Maine, 290.

(h) *Case v. Greene*, 5 Watts, 262; *Robbins v. Luce*, 4 Mass. 474; *Smith v. Loomis*, 7 Conn. 110, 116; *McConnel v. Hall*, *Brayton*, 223; 2 Kent, 508; *Jewett v. Bacon*, 6 Mass. 60; *Currier v. Currier*, 2 N. H. 75; *Brown v. Berry*, 14 N. H. 459; *Haynes v. Thom*, 28 N. H. 400; *Miles v. Roberts*, 34 N. H. 254; *Thaxter v. Edwards*, 1 Stewart (Ala.), 524; *Savary v. Goe*, 3 Wash. C. C. 140; *Robinson v. Batchelder*, 4 N. H. 46; *Curtiss v. Greenbanks*, 24 Vt. 536; *Zinn v. Rowley*, 4 Barr, 169; *Games v. Manning*, 2 Greene (Iowa), 254; *Mitchell v. Merrill*, 2 Blackf. 87; *Slingerland v. Morse*, 8 John. 474; *Lamb v. Lathrop*, 13 Wend. 95; *Chipman Cont.* 158; *Johnson v. Baird*, 3 Blackf. 182; *Fleming v. Potter*, 7 Watts, 380; *Barnes v. Bliss*, 1 D. Chipman, 399; *Weld v. Hadley*, 1 N. H. 295; *Miles v. Roberts*, 34 N. H. 245; *Des Arts v. Leggett*, 16 N.

[chattels in the creditor, so that he may sue for them, if necessary, in trover. (*i*) In order to have this effect, the chattels must be separated, set apart, and designated, so that the creditor may distinguish them from all others. (*k*)

Title to chattels vested by an effectual tender. Chattels must be designated and set apart.

Y. 582. If the debtor be ready with the chattels for delivery at the time and place appointed, this will be sufficient. *Brown v. Berry*, 14 N. H. 459; *Bronson v. Wiman*, 4 Selden (N. Y.), 182; *Gilman v. Moore*, 14 Vt. 457. This goes upon the ground that the debtor has done all incumbent on him. *Chipman Cont.* 158; 6 Bac. Abr. 459; *Comstock J. in Des Arts v. Leggett*, 16 N. Y. 592. The creditor cannot, by a subsequent demand and refusal, revive his right to sue *on the contract*. *Lamb v. Lathrop*, 13 Wend. 95. But see opinions of Selden, Roosevelt, Harris, and Pratt JJ. in *Des Arts v. Leggett*, 16 N. Y. 595.

(*i*) *Des Arts v. Leggett*, 16 N. Y. 582; 2 Kent, 509; *Rix v. Strong*, 1 Root, 55; *Nichols v. Whiting*, 1 Root, 443; *Leballister v. Nash*, 24 Maine, 316; *Smith v. Loomis*, 7 Conn. 110; *Curtiss v. Greenbanks*, 24 Vt. 536. But see *Weld v. Hadley*, 1 N. H. 275, and the remarks upon it in 2 Kent, 509, and in *Des Arts v. Leggett*, 16 N. Y. 590-593. If the tender is refused, the party making it may, if he so elect, continue in possession, and thereupon become a bailee for the creditor. *Des Arts v. Leggett*, *supra*.

(*k*) *Smith v. Loomis*, 7 Conn. 110; *Veazey v. Harmony*, 7 Greenl. 91; *Wyman v. Winslow*, 2 Fairf. 398; *Leballister v. Nash*, 24 Maine, 316; *Cherry v. Newby*, 11 Texas, 457. In 2 Fairf. 398, Mellen C. J. examined the authorities; and in stating the results of his examination, said: "In the case of *Robbins (in error) v. Luce*, 4 Mass. 474, the defendant, by his note, promised to deliver at his house twenty-seven ash barrels, on the 20th September, 1804. The defendant pleaded that he was ready at his house at the time the note became due to deliver the barrels; and though there was no averment that the

plaintiff was not there, the plea was adjudged good. In this case it does not appear that any particular barrels had been set apart for the plaintiff and separated from others; nor is any such requisite alluded to. Nor is it mentioned as requisite in the case of *Lancashire v. Killingworth*, 1 Ld. Raym. 687. In the case of *McConnel v. Hall*, *Brayt.* 223, the court say, when speaking of the tender of the wagon, which the defendant promised to deliver to the plaintiff, 'proving that he was able to perform, would be no evidence of his *intention* to fulfil on that day, he must make such designation of the article on the day and at the place of payment as will *transfer the property to the promisee*, and enable him to pursue the property itself.' The case of *Newton v. Galbraith*, 5 John. 119, is similar in principle. *Galbraith* sued *Newton* on notes payable in *produce*, at *Newton's* house; on trial the defendant proved that on the day the note became due he had *hay* in his barn, and was then *ready* to pay in hay; but no particular quantity was proved. The court said the tender proved was insufficient, but they relied upon the uncertainty as to *quantity*. The case of *Barnes v. Graham*, 4 Cowen, 452, is more direct and explicit. Defendant gave his note for \$127, payable in lumber. The defendant offered to prove that when the note became due, he had, at his mill in Italy, where both parties lived, a sufficient quantity of lumber of the quality described, in bulk, and not sorted or separated from other lumber at the mill. The decision was against the defendant on two grounds: 1. Because no place of delivery being expressed in the note, it was the duty of the defendant to seek the plaintiff and request him to appoint some proper place for the delivery of the lumber. 2. And because he never separated the property he in-

[As, in case of money, so, of chattels, a tender must be unconditional. Thus, where the debtor left the chattels at the place specified, in the hands of a person, who was authorized to deliver them only in case the creditor produced and gave up the written contract, it was held that the chattels were not so ready at the time and place as to discharge the contract. (*k*¹)

Tender must be unconditional.

Under a contract to deliver chattels at a certain time and place, it is a good defence *pro tanto* that the creditor received and accepted a part of the articles before the day specified. (*l*)

Defence of part delivery.

tended to tender in payment of the note. Savage C. J. says: Suppose a fire had happened and consumed all the lumber at the mill the night after the tender, must the payee have lost it to the extent of his demand; how could he know what part to preserve, had he been at the fire? In *Smith v. Loomis*, 7 Conn. 110, a similar decision was had. The original action was founded on a note given by Loomis, by which he promised the plaintiff to pay and deliver to him fifty-one dollars' worth of good merchantable bricks, at five dollars per thousand. The defendant pleaded that he had *ready to be delivered* at his brickyard (which was the place of delivery), fifty-one dollars' worth of good merchantable bricks in payment of the note, but that the plaintiff did not appear to receive them. Peters J. in delivering the opinion of the court, says: 'He (the defendant) could have designated the bricks intended for the plaintiff and set them apart, and thus have paid the debt, *by vesting the property in the plaintiff*.' Until this was done the note remained unpaid, and the defendant liable to be sued. The presence of the creditor was not necessary to enable the debtor to fulfil his contract.' The court reversed the judgment of the court below, which, as Mr. Justice Peters observes, was governed by the decision in the case of *Robbins v. Luce*, before mentioned. It appears, also, that the cases of *Rice v. Strong*, 1 Root, 55; *Nichols v. Whiting*, 1 Root, 443; and *Gallup v. Coit*, decided at Norwich, in 1808, were all decided upon the same principle. In this

last case it appeared that the promise was to pay £20 in rum. The defendant tendered forty-eight gallons in a hogshead containing seventy gallons. The court said the rum must be set apart and designated, so that he whose property it becomes by the tender may bring trover for it. It appearing to be a settled principle of law, that the effect of a legal tender and refusal of specific articles, or of those facts, in the absence of the creditor, which amount to a tender, is to discharge and satisfy the debt, by vesting the property tendered in the creditor, the reason of the thing requires that there should be such a separation or designation of the property as that the creditor may *know* his property and *distinguish* it, and be able to assert successfully his right of property against any one who may invade it. 2 Kent, 400." In *Smith v. Loomis*, 7 Conn. 119, Peters J. said: "Though we find much confusion and contradiction in the books on this subject, our own practice seems to have been uniform for nearly sixty years, and establishes these propositions: 1. That a debt, payable in specific articles, may be discharged by a tender of these articles, at the proper time and place. 2. That the articles must be set apart and designated, so as to enable the creditor to distinguish them from others. 3. That the property so tendered vests in the creditor, and is at his risk. 4. That a tender may be made in the absence of the creditor."

(*k*¹) *Robinson v. Batchelder*, 4 N. H. 40.

(*l*) *Robinson v. Batchelder*, 4 N. H. 40.

[A creditor may make a demand for specific articles by his agent ; and so a debtor may tender by an agent, or to an agent, Agent. authorized to act for the purpose. (*m*)

Where a right of action has accrued for the non-delivery of an article agreed to be delivered in a certain event, such right is not defeated by a subsequent tender. (*n*)

Tender after breach by non-delivery at agreed time.

We have already seen that, where there is a contract to pay a certain sum of money in a specified quantity of chattels, if the debtor fails to deliver the chattels according to his contract, the debt becomes payable absolutely in the sum of money specified. (*o*) Where, however, the contract is merely for the delivery of a certain quantity of chattels, the creditor has a right to recover the damages actually sustained upon a breach of it, estimated on the usual principles.] (*p*)

Damages.

(*m*) See *Vance v. Bloomer*, 20 Wend. 200, 210 ; *Aldrich v. Albee*, 1 Greenl. 120, 123 ; *Robinson v. Batchelder*, 4 N. H. 40 ; 2 Kent, 508 ; *Brown v. Berry*, 14 N. H. 459 ; *Rice v. Churchill*, 2 Denio, 148.

(*n*) *Gould v. Banks*, 8 Wend. 562. But it was held in this case, that if a tender be subsequently made, and the party to whom the property is agreed to be delivered, places his refusal to accept upon the ground that the article is not merchantable, he waives his right to insist on the former default. So, where the creditor makes a subsequent demand of the property. *Buck v. Burk*, 4 Smith (N. Y.), 337. In answer to proof of tender, the creditor may show that the property tendered was defective in quality. *Gould v. Banks*, 8 Wend. 562 ; *Brown v. Berry*, 14 N. H. 459. A promise to pay in the wares of a particular trade, is not fulfilled by the delivery of wares that are broken, unsound, antiquated and unsalaable. Wares are intended that are entire, and of a kind and fashion in ordinary use. *Dennett v. Short*, 7 Greenl. 150. So, if the law requires certain acts to be done before the property can be legally transferred, those acts must be performed before the tender. As, where the law required leather to be stamped in a particular manner ; *Elkins v. Parkhurst*, 17 Vt. 105 ; or merchandise to be packed in a certain manner ; *Clark v. Pinney*, 7 Cowen, 681. See, also, *Goss v. Turner*, 21 Vt. 437. If a note is payable in leather and with no designation of quality, the creditor has a right to require merchantable leather. *Elkins v. Parkhurst*, 17 Vt. 105.

(*o*) *Ante*, 1207, 1208 ; *Heywood v. Heywood*, 42 Maine, 229.

(*p*) Per Shaw C. J. in *Hill v. Rewee*, 11 Met. 268, 275, 276. If money is paid on an executory contract to deliver goods in future, and the party contracting to deliver fails to perform, the other party may treat the contract as rescinded and recover back the money paid, on the ground that the consideration has failed, or he may affirm the contract, and recover damages for the non-performance. *Dutch v. Warren*, 1 Strange, 406, and more accurately stated by Lord Mansfield in 2 Burr. 1010 ; per Shaw C. J. in *Hill v. Rewee*, 11 Met. 268, 271, 272.

10. *The Statute of Limitations.*

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| 1. In general.
2. From what period the limitation is to be dated.
3. Of the revival of the demand by an acknowledgment.
1. In general.
2. What is a sufficient acknowledgment. | 3. By whom it may be made.
4. To whom it may be made.
5. Stating an account, and promise to pay the balance.
6. Effect of part payment.
4. Of renewing a writ to save the statute.
5. Of the pleadings. |
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1. In General.

With us, the limitation of actions is regulated entirely by statute, the mere lapse of time not being, at common law, pleadable in bar thereof. But still, even at common law, great delay in instituting proceedings might, unless explained, furnish the jury with grounds for presuming that the claim had been satisfied. (*g*¹)

And the reasons on which limitations of actions, in general, are founded, are thus stated by Pothier. (*h*)

“The prescription is founded, first, upon a presumption of a payment, or release, arising from length of time; as it is not common for a creditor to wait so long, without enforcing payment of what is due; and — as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit* — the laws have formed the presumption that the debt was acquitted or released. Besides, a debtor ought not to be obliged to take care forever of the acquittances which prove a demand to be satisfied; and it is proper to limit a time, beyond which he shall not be under the necessity of producing them. Secondly,

(*g*¹) [*Ante*, 1103, 1104. The parties may by their contract, limit the time within which an action shall be commenced in reference to it. *North Western Ins. Co. v. Phoenix Oil & Candle Co.* 31 Penn. St. 448; *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, 596; *Cray v. Hart. Fire Ins. Co.* 1 Blatchf. C. C. 280; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; *Ketchum v. Protection Ins. Co.* 1 Allen (New Bruns.), 136, 187. But see *French v. Lafayette Ins. Co.* 5 McLean, 461.]

(*h*) On Contracts, pt. 3, c. 8, art. 2, by Evans, vol. i. 451. “The statute of limitations was intended for the relief and quiet

of defendants, and to prevent persons from being harassed, at a distant period of time after the committing of the injury complained of.” Per Abbott C. J. *Battley v. Faulkner*, 3 B. & Ald. 292. “One of the objects of the statute of limitations was, that the action should be brought to trial at a period of time when the defendant could be prepared with his witnesses to meet the charge, which would not be the case if the action might be postponed to an indefinite period.” Per Bayley J. *Ib.* 293; and see per Cur. *Rhodes v. Smethurst*, 6 M. & W. 351, 356.

it is also established as a punishment for the negligence of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received when he has suffered that time to elapse."

1. The statute 21 Jac. 1, c. 16, s. 3, (*i*) enacts, "that all actions of account, and *upon the case*, (*k*) (other than such ^{21 Jac. 1, c. 16.} accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,) and all actions of debt grounded upon any lending or contract, *without specialty*, and all actions of debt for arrearages of rent, shall be *commenced* and sued *within six years next after the cause of such action or suit, and not after.*"

But this statute does not discharge or extinguish the debt, it only bars the remedy, (*k*¹) and accordingly, it is held, ^{Its effect.} that a lien in respect of the debt is not destroyed, though the remedy by writ, to recover the debt itself, may be gone. (*l*) Upon the same ground it is that, as we shall see presently, the demand may be revived by the debtor's subsequent promise or acknowledgment, without any new consideration. And it has been held, in equity, that the statute does not run against a creditor of

(*i*) "The statute of limitations, on which the security of all men depends, is to be favored." Per Cur. Green v. Rivett, 2 Salk. 422. "The statute ought to receive a liberal construction." Per Dallas J. Kelling v. Shaw, 1 Moore, 345. [In Spring v. Gray, 5 Mason, 523, Mr. Justice Story said: "I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest objects. It is a statute of repose. The defence which puts it forth, is an honorable defence. There is wisdom and policy in it, as it quickens the diligence of creditors, &c. Yet I well remember the time, when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence," &c. See Bell v. Morrison, 1 Peters (S. C.), 360; per Parsons C. J. in Perkins v. Burbank, 2 Mass. 81; Gautier v. Franklin, 1 Texas, 782; Dickinson v. McCarny, 5 Geo. 486.] The act 3 & 4 Will. 4, c. 27, limits actions

and suits relating to *real property*. The 3 & 4 Will. 4, c. 71, shortens the time of *prescription* in certain cases. The 2 & 3 Will. 4, c. 100, shortens the time required in claims of *modus decimandi*, or exemption from or discharge of tithes.

(*k*) This was held to include *assumpsit*. See Battley v. Faulkner, 3 B. & Ald. 294.

(*k*¹) [So that a demand is affected only by the statute of limitations which is in force when the remedy is sought; Winston v. McCormick, 1 Smith, 8; Patterson v. Gaines, 6 How. (U. S.) 550; even if that statute has extended a former period of limitation, which was running on a demand, but had not fully expired when the subsequent statute was passed. Ib. But if a demand is barred under one statute, no subsequent statute can revive the remedy upon it. M'Kinney v. Springer, 8 Blackf. 506; Hawkins v. Campbell, 1 English, 512.]

(*l*) See Spears v. Hartley, 3 Esp. 81; Higgins v. Scott, 2 B. & Ad. 413, 414.

a bankrupt after a fiat has been issued ; although the six years elapsed after the issuing of such fiat, and before the creditor applied to prove. (*m*) But if, at the time the fiat issued, the statute has attached upon the demand, the creditor cannot be a petitioning creditor, (*n*) or prove against the estate in respect of such demand. (*o*)

The statute of James applies to all actions upon written or verbal contracts, for the recovery of debts or damages, whether the claim be made in a court of law or in equity. (*p*) So it applies to actions on bills of exchange ; (*q*) or by an attorney for his fees. (*r*) So it applies to an action of debt for a penalty, due under a by-law made by virtue of a charter. (*s*) So, if money which has been deposited in the ordinary way with a banker, be allowed to remain in his hands for six years, without any payment by him of the principal, or any allowance of interest in respect thereof, the statute of limitations will bar its recovery. (*t*) And if an action be brought in one of our courts, for a debt which was incurred and accrued due in a *foreign* country, or in Scotland ; the English statute of limitations may be pleaded in bar of such action, although, by the law of the country in which the debt was incurred, the period of limitation may not have expired. (*u*)

To what
actions it
applies.

(*m*) *Ex parte* Ross, 2 G. & J. 46.

(*n*) *Emery v. Mucklow*, C. P. H. T. 1834, MS.; 1 Deac. Bkpt. Law, 98; Eden, 2d ed. 45, 46; and see 24 & 25 Vict. c. 134, s. 97.

(*o*) *Ex parte* Dewdney, 15 Ves. 498; *Ex parte* Roffy, 2 Rose, 245; S. C. 19 Ves. 468.

(*p*) Bac. Abr. Limitation of Actions, D. 2, 4; E. Chit. Eq. Index, tit. Limitations, Statute of.

(*q*) *Renew v. Axton*, Carth. 3.

(*r*) *Oliver v. Thomas*, 3 Lev. 367.

(*s*) *Tobacco-pipe Makers v. Loder*, 16 Q. B. 765; 20 L. J. Q. B. 414.

(*t*) *Pott v. Clegg*, 16 M. & W. 321.

(*u*) *Ante*, 133, [and cases in note (*o*). So, on the other hand, where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country; it was held, that

the Massachusetts statute of limitations could not be pleaded in bar to an action upon the debt, brought within six years after the parties came into the State of Massachusetts. *Bulger v. Roche*, 11 Pick. 36; *Way v. Sperry*, 6 Cushing, 238; *Graves v. Weeks*, 19 Vt. 178. See *Lo Roy v. Crowningshield*, 2 Mason, 151. The law of Texas is otherwise. *Hays v. Cage*, 2 Texas, 501. In *Bulger v. Roche*, *supra*, it appeared that the cause of action accrued in February, 1821, more than six years before the commencement of the action; the plaintiff and defendant were both domiciled at Halifax, in Nova Scotia, and were subjects of the king of Great Britain, and continued to reside in Nova Scotia until March, 1827, and by the law of that country an action of *assumpsit* is barred in six years; the plaintiff came into Massachusetts, for the first time, in 1829, and the action was commenced within six

2. The statute of James, it will be observed, excepts from the operation thereof, "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." (*u*¹)

Exception as to merchants' accounts, abolished by 19 & 20 Vict. c. 97, s. 9.

years from that time. Shaw C. J. said: "That the law of limitation of a foreign country cannot, of itself, be pleaded as a bar to an action in this commonwealth, seems conceded; and is, indeed, too well settled by authority to be drawn in question. *Byrne v. Crowingshield*, 17 Mass. 55. The authorities both from the civil

and the common law concur in fixing the rule, that the nature, validity, and construction of contracts is to be determined by the law of the place where the contract is made; and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. Whether a law of prescription,

(*u*¹) [This exception was held to extend to all cases of mutual or reciprocal accounts current or open between merchants, but not to accounts stated between them. *Bul. N. P.* 149; 2 *Saund.* 124, 127 a, note. Whether the accounts must be in writing, see *Mills v. Fowkes*, 5 *Bing. N. C.* 455; *Penniman v. Rotch*, 3 *Met.* 216. When an account had been stated, or balanced, the action must have been brought within six years; *Tolland v. Sprague*, 12 *Peters (U. S.)*, 300; *Breckenridge v. Baltzell*, 1 *Smith*, 217; *Bevan v. Cullen*, 7 *Barr*, 281; *Fox v. Fisk*, 6 *How. (Miss.)* 328; *Ex parte Storer, Davies*, 294; but if, after it has been adjusted, a following account is added, in such case the plaintiff shall not be barred by the statute, because it is still a running account. 2 *Saund.* 124, 127 a, note; *Farrington v. Lee*, 2 *Modern*, 311, 312; *S. C.* 1 *Ib.* 268. An account closed is not necessarily a settled account. *Bass v. Bass*, 8 *Pick.* 187. In Massachusetts, and in some other states, there is also an exception to the statute of limitations, in favor of witnessed promissory notes. But to render this exception available, the action must be brought by the original payee, or by his executor or administrator. *Genl. Sts. c.* 155, § 4. The holder of such a note, payable to a person therein named or bearer, may maintain an action thereon, for his own use, in the name of the administrator of the payee, after the expiration of six years from the time when the cause of action accrued, pro-

vided the action is brought with the consent of such administrator. *Sigourney v. Severy*, 4 *Cush.* 176. So, an indorsee may maintain an action in the name of the payee, and recover, under the same circumstances, if the payee consents or does not object thereto. *Hodges v. Holland*, 19 *Pick.* 43. So, where a witnessed note is sold and delivered without indorsement by the payee, the purchaser may sustain an action, after six years, in the payee's name, and the assent of the payee to the use of his name for that purpose is not necessary. *Rockwood v. Brown*, 1 *Gray*, 261. So, where the payees of such a note became bankrupts, after six years from the time when it became payable, and one of them afterwards purchased the note of the assignee, and took it by delivery, without indorsement; it was held, that the purchaser might maintain an action in his own and the name of the other payee, for his own benefit. *Drury v. Vannevar*, 5 *Cush.* 442. See *Rockwood v. Brown*, 1 *Gray*, 261. But in Maine, this privilege of a witnessed note is not confined to an action by the payee, but extends also to an action by an indorsee. *Stanley v. Kempton*, 30 *Maine*, 118. But it is held to apply only to notes payable in money. *Dennett v. Goodwin*, 32 *Maine*, 44. It seems to be otherwise in Vermont. *Bragg v. Fletcher*, 20 *Vt.* 351. It is not necessary that the note should be negotiable to give it the benefit of the exception. *Sibley v. Phelps*, 6 *Cush.* 172.]

But by the 19 & 20 Vict. c. 97, s. 9, it is enacted, that "all actions of account or for not accounting, and suits for such accounts as

or statute of limitation, which takes away every legal mode of recovering a debt, shall be considered as affecting the contract, like payment, release, or judgment, which in effect extinguishes the contract, or whether they are to be considered as affecting the remedy only by determining the time within which a particular mode of enforcing it, shall be pursued, were it an open question, might be one of some difficulty. It was ably discussed upon general principles in a late case (*Le Roy v. Crowningshield*, 2 Mason, 151), before the circuit court, in which, however, it was fully conceded by the learned judge, upon a full consideration and review of all the authorities, that it is now to be considered a settled question. A doubt was intimated in that case, whether, if the parties had remained subjects of the foreign country until the term of limitation had expired, so that the plaintiff's remedy would have been extinguished there, such a state of facts would not have presented a stronger case, and one of more serious difficulty. Such was the case in the present instance; but we think it sufficient to advert to a well settled rule, in the construction of the statute of limitations, to show that this circumstance can make no difference. The rule is this: that where the statute has begun to run, it will continue to run, notwithstanding the intervention of any impediment, which, if it had existed when the cause of action accrued, would have prevented the operation of the statute. For instance, if this action accrued in Nova Scotia in 1821, and the plaintiff or defendant had left that country in 1825, within six years, in 1828, after the lapse of six years, the action would be as effectually barred and the remedy extinguished there, as if both had continued to reside in Halifax down to the same period. So, that when the parties met here in 1829, so far as the laws of that country, by taking away all legal remedy, could affect it, the debt was extinguished, and that equally

whether they had both remained under the jurisdiction of those laws, till the time of limitation had elapsed, or whether either or both had previously left it. The authorities referred to must, therefore, be held applicable to a case where both parties were subject to the jurisdiction of a foreign state, when the bar arising from its statute of limitations attached. The same conclusion results from the reason upon which these cases proceed, which is, that statutes of limitation affect only the time, within which a legal remedy must be pursued, and do not affect the nature, validity, or construction of the contract. This reason, whether well founded or not, applies equally to cases, where the term of limitation has elapsed, when the parties leave the foreign state, as to those, where it has only begun to run before they have left the state, and elapses afterwards. But though it is not much insisted that the foreign statute can itself be pleaded as a substantive bar, still it is contended, that it avoids the exception within which the plaintiff has attempted to bring himself by his replication. The statute itself provides, that it shall not be understood to bar any person, beyond sea, without any of the United States, from bringing such action within the term limited, reckoning from the time that such impediment shall be removed. This proviso, in terms, excludes the operation of the statute in all cases, where the plaintiff is out of the commonwealth at the time the cause of action accrues, without distinguishing whether the plaintiff be a citizen, or one who has formerly resided in the state, and who is casually absent, or a foreigner who has never been within it. And so it has been decided. *Wilson v. Appleton*, 17 Mass. 180. This proviso also excludes the operation of the statute, when the defendant is out of the state, and until six years after he shall return. The construction of this clause also has been, notwithstanding the use of the word 'return,' that it applies as

concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits; or, where such cause has already arisen, then within six years after the passing of" that act. And — inasmuch as the above exception was held to apply only to cases where an action of account, or perhaps an action for not accounting, would lie; and not to cases in which it would be proper to sue on the common counts (*v*) — the effect of the late statute is, to do away with the exception as to merchants' accounts altogether.

3. Again: before the passing of Lord Tenterden's act it was held, that wherever there were mutual or cross accounts or dealings, though not between merchants or relating to merchandise, for any one item of which credit had been given within six years, this was evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. (*x*) After the passing of Lord Tenterden's act, however, it

Case of cross accounts.

well to foreigners coming into the state originally, as to citizens who have been absent. *Dwight v. Clark*, 7 Mass. 515." "Our law, conforming to the comity of all civilized states, gives effect to foreign contracts and obligations, which follow the persons respectively when the contracts are not immoral or injurious. The plaintiff, having a right to sue in our courts, must conform to our law, as to the time of bringing his action, and all other particulars affecting his remedy. That remedy is not barred or taken away by our statute of limitation, until six years have elapsed after both the plaintiff and the defendant have been within the jurisdiction of the commonwealth."]

(*v*) *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & G. 271.

(*x*) *Catling v. Skoulding*, 6 T. R. 189; 2 Wms. Saund. 127 b, note. [See an able discussion of this subject by Parker J. in *Blair v. Drew*, 6 N. H. 235; and see, also, *Codman v. Rogers*, 10 Pick. 118; *Spring v. Gray*, 5 Mason, 525; S. C. 6 Peters (S. C.), 151; *Murray v. Coster*, 20' John. 583, 592, 599; *Collyer Partn.* § 376, and

note; *Union Bank v. Knapp*, 3 Pick. 113; *Bass v. Bass*, 6 Pick. 362; S. C. 8 Pick. 187; *Mandeville v. Wilson*, 5 Cranch, 15; *M'Lellan v. Crofton*, 6 Greenl. 308; *Davis v. Smith*, 4 Greenl. 339; *Stiles v. Donaldson*, 2 Dall. 264. But see *Coster v. Murray*, 5 John. Ch. 522; *Murray v. Coster*, 20 John. 582; *Ramchander v. Hammond*, 2 John. 200; *Ogden v. Astor*, 4 Sandford, (S. C.) 311; *James v. Richmond*, 5 Ham. 338; *Rhyn v. Vincent*, 1 McCord, 150; *Spring v. Gray*, 5 Mason, 528; *Blair v. Drew*, 6 N. H. 235. In this last case, it was held, that one item of an account, though not barred by the statute, does not draw after it other items which are barred. The law on this head is settled in Massachusetts by statute; which enacts, that "In actions of contract brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in the account." Genl. Sts. c. 155, § 5. Such is also the law in Maine; but if a party sleeps on a demand without entering it on his account, until the period of limitation is elapsed,

was settled, that the mere fact of there being open accounts between two parties, was not enough to take the case out of the operation of the statute. (*y*) And now, by the 19 & 20 Vict. c. 97, s. 9, it is further enacted, that "no claim in respect of a matter which arose more than six years before the commencement of the action or suit, shall be enforceable by action or suit, by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of such action or suit."

So, where *all* the items of an account are *on one side*, as in an account between a tradesman and his customer, or in an account containing several items for money lent; it was held, even before the 19 & 20 Vict. c. 97, that the fact of there being some items within six years would not, of itself, defeat the statute as to those that were of longer standing. (*z*)

he cannot extract it from the statute by entering it afterwards on his account. *Ex parte Storer*, Davies, 294. See, on the subject of mutual accounts, *Franklin v. Camp*, 1 Cox, 196; *Smith v. Ruccastle*, 2 Halst. 357; *Bennett v. Davis*, 1 N. H. 19; *Stiles v. Donaldson*, 2 Yeates, 105; *Coleman v. Hutchinson*, 3 Bibb, 209; *Chamberlain v. Cuyler*, 9 Wend. 126; *M'Lellan v. Crofton*, 6 Greenl. 308; *McNaughton v. Norris*, 1 Hayw. 216; *Bond v. Jay*, 7 Cranch, 350; *Tucker v. Ives*, 6 Cowen, 193; *Davis v. Smith*, 4 Greenl. 337; *Collyer Partn.* § 376, and note.]

(*y*) *Williams v. Griffiths*, 2 Cr., M. & R. 45; *Mills v. Fowkes*, 7 Scott, 444; *Cottam v. Partridge*, 4 M. & G. 271; 4 Scott N. R. 819; *Clark v. Alexander*, 8 Scott N. R. 147.

(*z*) *Roberts v. Roberts*, 1 M. & P. 487; *Cotes v. Harris*, Bul. N. P. 149; 2 Wms. Saund. 127 a, c, notes; *Rothery v. Munnings*, 1 B. & Ad. 15; and see *Phillips v. Broadley*, 9 Q. B. 744; [*Palmer v. New York*, 2 Sandf. (S. C.) 318; *Buntin v. Lagow*, 1 Blackf. 373; *Kimball v. Brown*, 7 Wend. 322; *Ingram v. Sherard*, 17 Serg. & R. 347; *Chipman v. Bates*, 5 Vt. 143; *Hutchinson v. Pratt*, 2 Ib. 146. A shopkeeper's account, containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more

than six years before action brought, is not an account current or a mutual account, so as that the charges within six years should draw the previous charges out of the operation of the statute of limitations. *Gold v. Whitcomb*, 14 Pick. 188. The law as laid down in the above case has been varied by statute. *Penniman v. Rotch*, 3 Met. 216, 223. If there be an item in the defendant's account within six years, this will take the account of the plaintiff out of the statute, though the latter contain no item within that period. *Davis v. Smith*, 4 Greenl. 337; *Penniman v. Rotch*, 3 Met. 216. The plaintiff cannot prove by his book and supplementary oath, an item on the credit side of his account, for the purpose of preventing the operation of the statute of limitations on his charges against the defendant. *Penniman v. Rotch*, *ubi supra*. Where all the items of the account between the plaintiff and the defendant, as merchants, bore dates more than twenty years antecedent to the commencement of the action, it was held that a small item of the debit of the defendant, dated within twenty years, but at a time when the defendant had ceased to be a merchant, such items not being of a mercantile character, would not revive the whole account against the defendant. *Hancock v. Cook*, 18 Pick. 30.]

But if, in such a case, there be evidence that all the items accrued under one contract, the statute will not attach. (*a*)

4. By the 4th section of the statute of James it is enacted, that if in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

When action may be brought after judgment reversed in error, &c.

5. And by sect. 7 it is enacted, "that if any person or persons that is or shall be entitled to any such actions of accounts, or actions of debts, shall be, at the time of any such cause of action given or accrued, fallen or to come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, (*a*¹) such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned

Case of plaintiffs under disability.

(*a*) *Phillips v. Broadley*, 9 Q. B. 744, 753.

(*a*¹) [It is held in Ohio, that the terms "*beyond seas*" in the statute of 1804, are equivalent to "*without the limits of the state*." *Richardson v. Richardson*, 6 Ham. 125. So in Indiana. *Stephenson v. Doe*, 8 Blackf. 508. This expression in Missouri means without the limits of the United States. *Marvin v. Bates*, 13 Mis. 217. The same was held in *Darling v. Meacham*, 2 Greene (Iowa), 602. So in Pennsylvania. *Thurston v. Fisher*, 9 Serg. & R. 288. So in North Carolina. *Whitlock v. Walton*, 2 Murphey, 23; *Earl v. Dickson*, 1 Dev. 16. As to the construc-

tion of these terms in the statutes of other states, see Stark. Ev. (5th Am. ed.) 485, note 3, tit. Limitations; *Varney v. Grows*, 37 Maine, 306; *Galusha v. Cobleigh*, 13 N. H. 79; *Wakefield v. Smart*, 3 English, 488; *Pancoast v. Addison*, 1 Harr. & J. 350. In Massachusetts it has been decided that a citizen of another state, who has never been in that commonwealth, is not a person "*beyond seas, without any of the United States*," and therefore is not within the saving clause in the statute of limitations. Stat. 1786, c. 52, § 4. See Genl. Sts. c. 155, § 6; *Whitney v. Goddard*, 20 Pick. 304.]

from beyond the seas, as other persons having no such impediment should have done." (b)

And it has been held, that an action for unliquidated damages is within the saving clause in this section. (c) So, if a party who is under disability when the cause of action accrues, commences an action after the six years have elapsed, but during the continuance of the disability, the operation of the statute is barred by this section. (c) So, where a married woman, being an administratrix, lent part of the assets to her husband, and took a promissory note from him and a surety for the amount; it was held, that she had six years after her husband's death within which she might sue the surety. (d) And so, if a plaintiff be under disability at the time of action accruing, he may sue at any time before the period of disability expires, or within the limited time thereafter. (e)

What cases
within the
exception.

Disability
must exist
when cause
of action
arose.

But in order to bring a party within the saving clause of the 7th section, the disability must exist when the cause of action arose; and where the time has once begun to run, no subsequent disability, however involuntary, will suspend its operation. (f)

So, if there be several joint creditors or claimants, but all of

(b) The 3 & 4 Will. 4, c. 42, s. 7, enacted, "that no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be *beyond the seas*," within the meaning of the statute of 21 Jac. 1, c. 16. [If there are several disabilities existing together at the same time, when the right of action accrues, the statute of limitations does not begin to run until the party has survived them all. *Butler v. Howe*, 13 Maine, 397; *Jackson v. Johnson*, 5 Cowen, 74; *Dugan v. Gittings*, 3 Gill, 138; *Demarest v. Wynkoop*, 3 John. Ch. 129; *Scott v. Haddock*, 11 Geo. 258. But a disability arising after a former disability has expired, cannot be added to it, to defeat the operation of the statute. *Stevens v. Bomar*, 9 Humph. 546. See *Dease v. Jones*, 23 Miss. (1 Cush.) 133; *Mercer v. Selden*, 1 How. (U. S.) 37; *Demarest v. Wynkoop*, 3 John.

Ch. 129; *Jackson v. Wheat*, 18 John. 40; *Bradstreet v. Clark*, 12 Wend. 602; *Scott v. Haddock*, 11 Geo. 258; 2 Sugden V. & P. (8th Am. ed.) 482, note (u).]

(c) *Piggott v. Rush*, 4 A. & E. 912.

(d) *Richards v. Richards*, 2 B. & Ald. 447.

(e) *Le Veux v. Berkeley*, 5 Q. B. 836.

(f) *Per Cur. Homfray v. Scroope*, 13 Q. B. 509, 512; and see *Smith v. Hill*, 1 Wils. 134; *Doc d. Doroure v. Jones*, 4 T. R. 311; *Grey v. Mendez*, Str. 556; *per Cur. Rhodes v. Smethurst*, 6 M. & W. 351, 356; [*Pendergrast v. Foley*, 8 Geo. 1; *Smith v. Newby*, 13 Missou. 159; *Dillard v. Philson*, 5 Strobbart, 213; *Ruff v. Bull*, 7 Harr. & J. 14; *Coventry v. Atherton*, 9 Ohio, 34; *Young v. Machall*, 4 Md. 362. The statute does not begin to operate unless there is some person *in esse*, competent to sue at the time the cause of action accrues. *Ruff v. Bull*, 7 Harr. & J. 14; *Hepburn v. Sewell*, 4 Harr. & J. 430.]

them are not under disability when the right of action accrues, the action must be commenced within six years from that period. (*g*)

Case of several claimants.

And now, by the 19 & 20 Vict. c. 97, s. 10, the fact of the claimant, or of one or more of several claimants, being, at the time the cause of action or suit accrues, *beyond the seas or in prison*, does not entitle him or them to any time within which to commence such action or suit, beyond the period fixed for the same by the 21 Jac. 1, c. 16, s. 3. And this section applies to all cases where the action was not commenced until after the act came into operation, although the cause of action accrued before that time. (*h*)

Being beyond sea or in prison, is not now a disability.

Under the statute of James, however, it was held, that where the plaintiff was a *foreigner*, he had six years for bringing his action, after his first coming to this country. (*i*) And so where an Englishman was abroad at the time the right of action accrued, and died without returning to this country; it was said to be questionable whether, in such a case, the executors might not sue, at any time within six years after their right accrued. (*k*)

Rule in the case of a foreigner.

But it would seem that, since the 19 & 20 Vict. c. 97, s. 10, the time within which the executors, in the latter case, must sue, would not be extended by the fact of the testator having died abroad. And it would also seem, that the effect of that statute is to limit the period within which a foreigner must sue, to six years from the time at which the cause of action accrued.

6. By the statute 4 Anne, c. 16, s. 19, persons entitled to their causes of action by the statute of James, shall be at liberty, if the *person against whom* the cause of suit exists were, at the time of such cause of action or suit

Case of defendant beyond seas.

(*g*) *Perry v. Jackson*, 4 T. R. 516; [Marsteller v. Mc'Clean, 7 Cranch, 156; *Riggs v. Dooley*, 7 B. Mon. 236; *Henry v. Means*, 2 Hill (S. Car.), 328; *Wells v. Ragland*, 1 Swan, 501.]

(*h*) *Cornill v. Hudson*, 8 E. & B. 429; *Pardo v. Bingham*, L. Rep. 4 Ch. Ap. 735.

(*i*) *Strithorst v. Graeme*, 3 Wils. 145; *Lafond v. Ruddock*, 13 C. B. 813; *Townsend v. Deacon*, 3 Exch. 706. [Such

United States. Hull v. Little, 14 Mass. 203; *Wilson v. Appleton*, 17 Mass. 180; *Bulger v. Roche*, 11 Pick. 36; *Way v. Sperry*, 6 Cush. 238; *Dwight v. Clark*, 7 Mass. 515; *Graves v. Weeks*, 19 Vt. 178; *King v. Lane*, 7 Missou. 241; *Alexander v. Burnett*, 5 Rich. 189; *Ruggles v. Keeler*, 3 John. 261; *Dunning v. Chamberlin*, 6 Vt. 127; *Estis v. Rawlins*, 5 How. (Miss.) 258; *ante*, 133, note (*o*), 1216, note (*u*).]

(*k*) Per Parke B. *Townsend v. Deacon*, 3 Exch. 706, 711.

given or accrued, fallen or come, beyond the seas, to bring the said action against such person after his return from beyond the seas; so as they take the same after his return from beyond the seas, within the time limited by the statute of James. (*k*¹)

And it was held, that Ireland was a place beyond seas, within the meaning of this statute, notwithstanding the provisions of the act of union, and of the 7th section of the law amendment act. (*l*)

But by the 19 & 20 Vict. c. 97, s. 12, it is enacted, that “no part of the United Kingdom of *Great Britain and Ireland*, nor the islands of *Man, Guernsey, Jersey, Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of her majesty, shall be deemed to be beyond seas, within the meaning of the” said statute of Anne, or of that act. (*m*)

So it has been held, under the 4 Anne, c. 16, s. 19, that if the

(*k*¹) [Statutes containing a similar provision have been enacted generally in the United States. It is provided by the Revised Statutes of Massachusetts, that “if, after any cause of action shall have accrued, the person against whom it has accrued shall be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.” Rev. Stat. c. 120, § 9; Gen. Sts. c. 155, s. 9. This exception in the Revised Statutes extends to foreigners who never were within the United States. *Von Hemert v. Porter*, 11 Met. 210. The provisions of this section do not, however, apply to a case in which the action was barred by the statute of limitations, that was in force before the Revised Statutes went into operation. *Wright v. Oakley*, 5 Met. 400; *Battles v. Fobes*, 18 Pick. 532; S. C. 19 Ib. 578. See *Davis v. Minor*, 1 How. (Miss.) 183. But it does apply to actions which accrued before the Revised Statutes went into operation, provided the right of action was not then barred, where the party, against whom it had accrued, afterwards was absent from and resided out of the state. *Darling v. Wells*, *Moor v. Bates*, 1 Cush. 508; *Brigham v. Bigelow*, 12 Met. 268. Under a corresponding provision in the statutes of New York, the lim-

itation does not apply to any portion of the time the debtor resides out of New York, notwithstanding he may frequently return on business; the time spent by the debtor in New York upon business is not to be taken into the account. *Burroughs v. Bloomer*, 5 Denio, 532. The New York statute applies to a case where the debtor “shall depart from and reside out of the state,” &c.; and it has been held, that but one case of absence is provided for; and on the return of the defendant into the state after his first departure, so as to be subject to the process of the court, and in a way to give operation to the statute, it then continues to operate, notwithstanding a subsequent departure. *Randall v. Williams*, 4 Denio, 577; *Cole v. Jessup*, 2 Barb. 309; *Dorr v. Swartwout*, 1 Blatchf. C. C. 179; *Didier v. Davidson*, 2 Barb. Ch. 477. The contrary has been decided in New Hampshire. *Gilman v. Cutts*, 23 N. H. 376. See *Valandingham v. Huston*, 4 Gilman, 125. From what facts and circumstances it may be inferred that a person is absent from and residing out of the state, see *Hackett v. Kendall*, 23 Vt. 275.]

(*l*) *Lane v. Bennett*, 1 M. & W. 70. [See *Whitney v. Goddard*, 20 Pick. 304.]

(*m*) This section is not retrospective. *Flood v. Patterson*, 30 L. J. C. 486.

defendant were in the East Indies when the cause of action accrued, the plaintiff may sue him within six years after his return to England, even although he lived for six years in the East Indies, within the jurisdiction of the supreme court of Calcutta. (*n*)

But if the debtor once return to this country, — though his stay here be but for a few days, and the fact of his return was unknown to the creditor, — the action must be brought within six years from the time of such return. (*o*)

So, where the testator resided abroad at the time the cause of action accrued, and died abroad; it was held that his executor, who resided in England, might be sued within ^{Party dying abroad.} six years *after taking out probate*; because, although the injury of which the plaintiff complained had existed more than six years, yet he had no cause of action until there was some person within the realm against whom the action could be brought; and, as the deceased was never in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed, until the defendant took upon himself the execution of the will. (*p*)

So it was held, under the statute of Anne, that if a right of action accrued against several, and one of them was beyond seas, the statute did not run until his return, al- ^{Several defendants.} though the others had never been absent from this kingdom. (*q*)

But now, by the 19 & 20 Vict. c. 97, s. 11, the time of limitation will run, as to any one or more of several joint debt- ^{19 & 20 Vict. c. 97, s. 11.} ors, who shall not be beyond seas at the time the cause

(*n*) *Williams v. Jones*, 13 East, 439.

(*o*) *Gregory v. Hurrill*, 5 B. & C. 341; and see *Towns v. Mead*, 16 C. B. 123; *Holl v. Hadley*, 2 A. & E. 758. The plaintiff *may* sue before the defendant's return; *Forbes v. Smith*, 11 Exch. 161. [In New York the *return* of the debtor, in order to put the statute in operation, must be such as to afford the creditor a reasonable opportunity to commence and prosecute his claim. See *Cole v. Jessup*, 2 Barb. 309; *Dorr v. Swartwout*, 1 Blatchf. C. C. 179. So in Massachusetts. *White v. Bailey*, 3 Mass. 271; and Vermont; *Maronon v. Foot*, 1 Aiken, 282; *Hill v. Bellows*, 15 Vt. 727. So in Maryland. *Hy-singer v. Baltzell*, 3 Gill & J. 158. See,

also, *Byrne v. Crowninshield*, 1 Pick. 263; *Little v. Blunt*, 16 Pick. 359; *Fowler v. Hunt*, 10 John. 464; *State Bank v. Seawell*, 18 Ala. 616; *Howell v. Burnett*, 11 Geo. 303; *Alexander v. Burnett*, 5 Rich. 189; *Randall v. Wilkins*, 4 Denio, 577; *Ford v. Babcock*, 2 Sandf. (S. C.) 518. And the burden seems to be upon the debtor to show that the creditor had such opportunity. See *Little v. Blunt*, 16 Pick. 359; *Maronon v. Foot*, 1 Aiken, 282; *Hill v. Bellows*, 15 Vt. 727; *Didier v. Davidson*, 2 Sandf. Ch. R. 61.]

(*p*) *Douglas v. Forrest*, 4 Bing. 686, 704; and see *Flood v. Patterson*, 30 L. J. C. 486.

(*q*) *Fanning v. Anderson*, 7 Q. B. 811.

of action or suit accrues, although some other or others of them is or are beyond seas at that time ; and a judgment recovered against the former, shall not be a bar to any action or suit against the latter, after his or their return from beyond seas.

7. A cause of action cannot be said to exist if, at the time it accrues, there be no person in existence who is capable of suing thereon. (*q*¹) And, accordingly, in an action by an administrator upon a bill of exchange made payable to the intestate, but which was not accepted until after his death, it was held that the six years did not begin to run until letters of administration had been granted. (*r*)

But where the six years expired in the lifetime of the testator, and no action was brought by him, the statute is a bar, and the executor cannot, by any proceeding, defeat its operation. (*s*)

So where the testator died, and the executor proved the will within the six years, but the action was not commenced until after the six years ; it was held that the statute was a bar to the action, although it was found as a fact, that the executor had commenced it within a reasonable time after the testator's death. (*t*)

Nor is it any answer to a plea of the statute of limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died ; that, by reason of litigation as to the right of probate, an executor of his will was not appointed until after the expiration of the six years ; and that the plaintiff sued as such executor within a reasonable time after probate granted. (*u*)

Where, however, the testator had brought an action within the six years, and it was abated by his death, (*x*) the executor had a reasonable time — *semble* a year — after the testator's death, to

(*q*¹) [Ruff v. Bull, 7 Harr. & J. 14 ; Hepburn v. Sewell, 4 Harr. & J. 393, 430.]

(*r*) Murray v. The East India Co. 5 B. & Ald. 204.

(*s*) Rex v. Morrell, 6 Price, 30.

(*t*) Penny v. Brice, 18 C. B. N. S. 393.

(*u*) Rhodes v. Smethurst (in error), 6 M. & W. 351 ; S. C. 4 M. & W. 42 ; [Abbott v. McElroy, 10 Sm. & M. 100. But, by statute in Massachusetts, if a person dies before the statute of limitations has fully run against a demand he holds

against another, or within thirty days after the period of limitation has expired, the executor or administrator may sue on the demand, at any time within two years after probate of the will or grant of administration. Rev. Stat. Mass. c. 120, § 10 ; Gen. Sts. c. 155, § 10.]

(*x*) The death of a plaintiff or defendant, does not now cause the action to abate. See 15 & 16 Vict. c. 76, s. 135. How the action is to be continued, see *Ib.* s. 137.

commence a new action, and thereby take the case out of the statute, although the six years might have elapsed before such fresh proceedings were taken. (y)

And where the defendant dies intestate, the plaintiff has a reasonable time after the grant of letters of administration, to commence a fresh action against the administrator. (z)

8. By the law amendment act, 3 & 4 Will. 4, c. 42, s. 3, it is enacted, "that all actions of debt for *rent upon an indenture of demise*, all actions of *covenant or debt upon any bond or other specialty*, and all actions of debt or *scire facias* upon any *recognizance*, and also all actions of debt upon any *award* where the submission is not by specialty, or for any *fine* due in respect of any copyhold estates, or for an *escape*, or for *money levied on any fieri facias*, and all actions for penalties, damages, or sums of money, given to the *party grieved* by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, (a) actions of debt, or *scire facias* upon recognizance, (b) within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the *party grieved*, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within

Limitation
of actions on
deeds, &c.

(y) See Bull. N. P. 150. And see the cases cited per Cur. Rhodes v. Smethurst, 6 M. & W. 353.

(z) Curlew v. Earl Mornington, 7 E. & B. 283; S. C. (in Cam. Scac.) 27 L. J. Q. B. 439. And the same rule applies to cases under the 3 & 4 Will. 4, c. 42, s. 3; Sturgis v. Darell, 4 H. & N. 622; S. C. (in Cam. Scac.) 6 H. & N. 120.

(a) An action for calls by a railway company, under the 8 & 9 Vict. c. 16, ss. 25, 26, is an action on a *specialty* within this statute. Cork & Bandon Railway Co. v. Goode, 13 C. B. 826. The provisions of the statute 3 & 4 Will. 4, c. 42, s. 3, are

now reconciled with those of the 3 & 4 Will. 4, c. 27, s. 42, by its being held, that the former apply only to the remedy against the *person*; whilst the latter apply to that against the *land*. Hunter v. Nockolds, 19 L. J. Chanc. 177; Strachan v. Thomas, 12 A. & E. 536, 556; Humfrey v. Gery, 7 C. B. 567; Hartshorne v. Watson, 5 Scott, 506; Page v. Foley, 2 Bing. N. C. 629; 3 Scott, 120; Manning v. Phelps, 10 Exch. 59.

(b) It will be observed, that *judgments* are not mentioned. As to the limitation in an action, or *scire facias*, thereon, see 3 & 4 Will. 4, c. 27, s. 40.

six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited."

Sect 4. "And be it further enacted, that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are, or shall be, at the time of any such cause of action accrued, *within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas*, (c) then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediments should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action is or are, or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons, within such times as are before limited after the return of such person or persons from beyond the seas."

Sect. 5. "Provided always, that if any *acknowledgment* (d) shall have been made, either *by writing signed* by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or *by part payment or part satisfaction*, (e) on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money (f) remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction as aforesaid; or in case the person or persons entitled to such action, shall at the time

(c) Being *beyond seas* is not now a disability, in any case within s. 3 of this statute. 19 & 20 Vict. c. 97, s. 10.

(d) An acknowledgment in an answer in chancery is sufficient under this section. *Moodie v. Bannister*, 28 L. J. C. 881. See effect of a recital in a deed, as an acknowledgment, *Howcut v. Bonser*, 3 Exch. 491; and see *Forsyth v. Bristowe*, 8 Exch. 716.

(e) It has been held, under this section,

that payment of interest on a bond by tenant for life, prevents the statute from barring the action against those in remainder. *Roddam v. Morley*, 26 L. J. C. 438; *Pears v. Laing*, 40 L. J. C. 222. But see *Coope v. Cresswell*, L. R. 2 Ch. Ap. 112.

(f) This does not extend to a bond conditioned for replacing stock. *Blair v. Ormond*, 17 Q. B. 423, 437.

of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be ; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

Sect. 6. " And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be *reversed by error* ; or a verdict pass for the plaintiff, and, on matter alleged in *arrest of judgment*, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill ; or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry ; that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

2. From what Period the Limitation is to be dated.

1. The statute of limitations does not necessarily begin to run from the time of the making of a contract or promise ; but it runs from the time when the plaintiff might have brought his action ; unless he was, at that time, subject to any of the disabilities already specified. (g)

It runs from the time plaintiff might have brought his action.

Thus, if the contract be to pay money at a *future period* ; or upon the happening of a certain event, as, " when J. S. is married ; " the six years are to be dated, in the for-

Contract to pay money in futuro.

(g) Per Cur. *Hemp v. Garland*, 4 Q. B. 519, 524 ; *Wilkinson v. Verity*, L. R. 6 C. P. 206, 209. " Prescription," says Pothier, " only begins to run from the time when the creditor has a right to institute his suit, because no delay can be imputed to him before that time. Hence, it is a general maxim with regard to this subject, *contra non valentem agere nulla currit prescriptio* ; consequently a prescription cannot begin to run whilst a debt is suspended by a condition." 1 Pothier by Evans,

451, part 3, c. 8, art. 2, s. 2. [" In the computation of the six years, the day on which the cause of action accrued is always included, and the reason given is, because an action might have been commenced on that day." *Little v. Blunt*, 9 Pick. 491 ; *Presbrey v. Williams*, 15 Mass. 193 ; *Cornell v. Moulton*, 3 Denio, 12. But in *Smith v. Cassity*, 9 B. Mon. 192, it was held, that the first day is to be excluded, and the last included, in such computation.]

mer case, from the arrival of the specified period ; and in the latter from the time when the event occurred. (*h*)

So, where a bill of exchange, payable at a future day, was drawn for the amount of a sum of money, lent by the payee to the drawer at the time of drawing the bill ; the payee was allowed to recover the money, in an action for money lent, although six years had elapsed since the actual advance of the money ; it being held that the statute began to run, only from the time when the money was to be repaid, that is, from the time when the bill became due. (*i*)

So, in an action for money had and received, to recover the consideration money paid on the grant of an annuity, the statute begins to run, not from the time the money was paid, but from the time at which the annuity was avoided. (*k*)

So, in the case of an attorney's bill for prosecuting or defending an action or suit, the six years are to be reckoned as to the whole bill, either from the termination of the action or suit, or from the time when, by giving reasonable notice to that effect, the attorney might have declined to proceed further with his client's business, unless the latter supplied him with funds. (*l*)

So, if goods be consigned to a factor for sale, an action does not lie against him *for not accounting*, until after demand made of an account ; and consequently the statute runs, in such a case, only from the time of the demand. (*m*)

(*h*) *Shutford v. Borough*, Godb. 437 ; *Bl.* 631 ; and see *Fryer v. Roe*, 12 C. B. *Fenton v. Emblers*, 1 *Bl.* 353. [Where a contract (made in the State of Louisiana), by the law of which it was valid, was entered into between husband and wife, after marriage, by which he promised to repay her certain money he had borrowed of her, it was held, in an action by her against his executors in Pennsylvania, that the statute of limitations did not begin to run until after his death. *Dougherty v. Snyder*, 15 Serg. & R. 84. See, also, *Richards v. Richards*, 2 B. & Ad. 447. So, in all cases where a right of action does not accrue until the death of a person, the statute of limitations then begins to run. *Quackenbush v. Ehle*, 5 Barb. 469 ; *Thompson v. Gordon*, 3 Strobbh. 196.]

(*k*) *Cowper v. Godmond*, 9 Bing. 748. (*l*) *Whitehead v. Lord*, 7 Exch. 691 ; 21 L. J. Exch. 239 ; and see *Phillips v. Broadley*, 9 Q. B. 744 ; *Rothery v. Munnings*, 1 B. & Ad. 15. [See *Foster v. Jack*, 4 Watts, 334, cited next note below ; *Johnson v. Pyles*, 11 Sm. & M. 190.]

(*m*) *Topham v. Braddick*, 1 Taunt. 572 ; [Taylor v. Spears, 3 Eng. 429 ; *Little v. Blunt*, 9 Pick. 490, 491 ; *Codman v. Rogers*, 10 Pick. 112, 119 ; *Lamb v. Clarke*, 5 Pick. 193 ; *Hutchins v. Gilman*, 9 N. H. 359 ; *Lyle v. Murray*, 4 Sandf. (S. C.) 590. The statute of limitations does not begin to run against the claim of an attorney for professional compensation, before demand is made, or the pro-

Where a sum of money is payable by instalments, and there is an agreement between the debtor and the creditor that, on non-payment of any one of such instalments, the whole shall become due, the statute begins to run from the first default. (n)

Money payable by instalments.

In cases between principal and surety the statute begins to run against the latter, from the time of his first payment in ease of the principal. But as between one co-surety and another, the statute does not begin to run against the surety, until he has paid more than his proportion of the debt for which he and his co-surety are jointly liable. (o)

Principal, surety, and co-sureties.

In the case of a contract of *indemnity*, the statute does not apply until the lapse of six years from the actual damnification. (p) And, accordingly, where the defendant had obtained from the plaintiff the loan of his acceptance for 40*l.*, payable forty days after date; it was held, that the statute began to run from the time the bill was paid by the plaintiff, and not from the time it became due. (q)

Indemnity.

Where work is done under a general contract, the cause of action accrues so soon as the work is done. (r)

Work done.

Where goods were sold at six months' credit, payment to be then made by a bill at *two* or *three* months, at the purchaser's option; it was held, that this was in effect a

Sale on credit.

fessional relation is dissolved. *Foster v. Jack*, 4 Watts, 334.]

(n) *Hemp v. Garland*, 4 Q. B. 519. [The statute does not bar claims for interest on a note, becoming due from year to year, until the principal of the note is barred. *Grafton Bank v. Doe*, 19 Vt. 463. But where a note is payable in several annual instalments, the statute begins to run against each instalment as it becomes due. *Burnham v. Brown*, 23 Maine, 400.]

(o) *Davies v. Humphreys*, 6 M. & W. 153.

(p) *Collinge v. Heywood*, 9 A. & E. 633; *Huntley v. Sanderson*, 1 C. & M. 467. [See *Rodman v. Hedden*, 10 Wend. 489. If an infant purchase necessities, and give a promissory note, signed by himself and a surety, and the surety afterwards pays the note, he is entitled to recover the amount so paid of the infant, and the cause

of action arises when the surety pays the note. *Conn v. Coburn*, 7 N. H. 368.

Where a surety pays the holder of a promissory note, before the note becomes payable, the cause of action accrues to the surety, and the statute of limitations begins to run at the time the note becomes payable. *Tillotson v. Rose*, 11 Met. 299.]

(q) *Reynolds v. Doyle*, 1 M. & G. 753; 2 Scott N. R. 45.

(r) *Emery v. Day*, 1 Cr., M. & R. 245, 248. [The statute begins to run so as to bar an action on a contract to perform certain work, from the time when the work was to be completed according to the contract, and not from the time when the plaintiff received actual damage from the imperfect execution of it. *Rankin v. Woodworth*, 3 Penn. 48.]

nine months' credit; and consequently, that an action for goods sold and delivered, commenced within six years from the end of the nine months, was brought in time to save the statute. (s)

When money is lent by check, the statute begins to run, not from the time when the check is given, but from the time when it is cashed by the bank on which it is drawn. (t)

If a bill or note be payable one month after sight, the six years are to be calculated from the expiration of a month after presentment. (u) So, if such an instrument be payable one month after demand, the limitation begins from the end of a month after an actual demand of payment; not at the expiration of one month from the date of the instrument. (x)

But if a promissory note be made payable *on demand*, no express demand is necessary; and consequently, in such a case, the statute begins to run from the date of the note. (y)

So, as between the indorsee and the drawer of a bill, the statute runs against the former, from the date of the bill, and not from the time at which he pays it to his indorsee. (z)

And with respect to foreign bills of exchange it is now decided, that the holder of such a bill has an immediate right of action thereon, on non-acceptance, and protest, and notice; and does not acquire a fresh right of action on non-payment thereof when due; and that, accordingly, the statute runs against him from the former, and not from the latter period. (a)

(s) *Helps v. Winterbottom*, 2 B. & Ad. 431; *Parke J. dub.* [See *Johnson v. Buckner*, 4 Missou. 624.]

(t) *Garden v. Bruce*, L. R. 3 C. P. 300.

(u) *Holmes v. Kerrison*, 2 Taunt. 323. [If a bill or note is payable on or after sight, the time of limitation begins to run upon a demand. *Wolfe v. Whiteman*, 4 Harr. 246.]

(x) *Thorpe v. Coombe*, R. & M. 388; and see *Waters v. Earl of Thanet*, 2 Q. B. 757, 769; [*Wenman v. Mohawk Ins. Co.* 13 Wend. 217; *Codman v. Rogers*, 10 Pick. 112. Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place and a dishonor there. Therefore the statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor. *Picquet v.*

Curtis, 1 Sumner, 478. Where a bill of exchange is entitled to grace, the statute of limitations does not commence running from the day it would have fallen due by its terms, but from the last day of grace. *Pickard v. Valentine*, 13 Maine, 412.]

(y) *Norton v. Ellam*, 2 M. & W. 461; *Christie v. Fonsick*, Selw. N. P. 9th ed. 351; [*Little v. Blunt*, 9 Pick. 488; *Ruff v. Bull*, 7 Harr. & J. 14; *Hill v. Henry*, 17 Ohio, 9. So, also, a receipt given for a sum of money borrowed, whereby the person borrowing undertook to return the money "when called on to do so," creates a cause of action from its date bearing interest, and against which the act of limitations begins to run from that time. *Darnall v. Magruder*, 1 H. & Gill, 439.]

(z) *Webster v. Kirk*, 17 Q. B. 944.

(a) *Whitehead v. Walker*, 9 M. & W. 506.

Where a debtor, who is protected by the statute, promises to pay whenever he may be able; the period at which the statute revives is that of the debtor becoming able to pay, not that of the creditor becoming acquainted with that fact. (b)

Conditional
promise.

So, the statute of limitations is a good defence to an action by a landlord for rent, against a person who was once his tenant from year to year, but who has not occupied the premises either actually or constructively, within the last six years, or paid rent, or done any act from which a tenancy could be inferred, although such tenancy has not been determined by a notice to quit. (c)

Action for
rent.

So, where a cause of action exists, with reference to which the parties enter into an agreement for an accord, the original cause of action revives if such accord be not performed; and, on non-performance thereof, the statute will be held to run from the accruing of such cause of action. (d)

After accord
unexecuted.

2. The gist of an action for the violation of a special contract, is the *breach* of such contract, and not any resulting or collateral damage which may be occasioned thereby; and, consequently, the statute runs in such cases from the time when the contract is broken, and not from that at which any damage arising therefrom is sustained by the plaintiff. Although, therefore, such damage accrue within six years, the action will be defeated by the statute, if the contract were *broken* before that period.

In special
actions, statute runs
from time of
contract
broken.

The following cases will illustrate this doctrine:—

A., under a contract to deliver spring wheat to B., delivered winter wheat; and B., having again sold the same as spring wheat, was compelled by action to pay damages to his vendee. B. afterwards sued A. for his breach of contract, alleging as special damage, the damages so recovered against him; and it was held that, although the special damage occurred within six years before the commencement of the action, yet, as the breach of the contract with A. had happened more than six years before that period, the statute of limitations was a bar. (e)

(b) *Waters v. Earl of Thanet*, 2 Q. B. 757, 770.

(d) *Reeves v. Hearne*, 1 M. & W. 323.

(c) *Leigh v. Thornton*, 1 B. & Ald. 624.

(e) *Battley v. Faulkner*, 3 B. & Ald. 288; and see *Violett v. Sympson*, 8 E. & B. 344.

So, in *Short v. M'Carthy*, (*f*) the defendant, an attorney, was sued for negligence in making a search at the bank, to ascertain whether certain stock was standing in the names of certain persons. The defendant's promise, his negligence, and the plaintiff's loss, occurred more than six years before the commencement of the action; but the plaintiff did not discover the injury he had sustained till within six years; and it was held, that the cause of action accrued from the time the breach of duty took place, although the plaintiff was then unconscious thereof.

So, in *Howell v. Young*, (*g*) the court applied the same doctrine to an action on the case against an attorney, for not using due care and diligence, in ascertaining whether a mortgage would be a sufficient security to the plaintiff for the repayment of money to be advanced; although the insufficiency of the security was not discovered until long after the occurring of such negligence. (*g*¹)

And the case of *Bree v. Holbech* (*h*) was decided upon the same principle. There an administrator, having found among the papers of the deceased a mortgage deed, assigned it, more than six years before the action, for the mortgage money, — affirming and reciting in the deed of assignment that it was a mortgage deed, made or mentioned to be made between the mortgagee and the mortgagor for that sum; and it was decided, that the assignee could not recover back the mortgage money from the assignor, although it turned out that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brought his action.

It was further contended in the above case, that where a party has been induced by fraud to pay money, the statute of limitations does not run; or, at least, that it runs only from the time the fraud is discovered. (*i*) And Lord Mansfield, in delivering judgment, said, "There may be cases which fraud will take out of the statute of limitations; but here, everything alleged in the replication may be true, without any fraud on the part of the defendant. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different."

(*f*) 3 B. & Ald. 626; *Brown v. Howard*, 2 B. & B. 73.

(*g*) 5 B. & C. 259.

(*g*¹) [*Argall v. Bryant*, 1 Sandf. 98; *Sinclair v. Bank*, 2 Strobb. 344; *Wilcox v. Plummer*, 4 Peters, 172. The case of

Derrickson v. Cady, 7 Barr, 27 does not agree with the cases cited in the text.]

(*h*) 2 Dougl. 654.

(*i*) Per Hill Serjt. *arguendo*, *Bree v. Holbech*, 2 Dougl. 654.

But the statute contains no exception, or saving, in the case of fraud; and it is therefore very difficult to see upon what ground the plaintiff, in an action at law, (*k*) *ex contractu*, could set up an undiscovered fraud as an excuse for not suing within six years. (*l*)

(*k*) In equity it is otherwise. See *South Sea Company v. Wymondsell*, 3 P. Wms. 143; *Bac. Abr. Limitations* (D. 4); 2 *Pothier*, by *Evans*, 126, 129; *E. Chit. Eq. Index*, tit. *Limitations*, Statute of; [*Mayne v. Griswold*, 3 Sandf. 463; *Kane v. Bloodgood*, 7 John. Ch. 90, 122; *Stocks v. Van Leonard*, 8 Geo. 511.] See *Ex parte Bolton*, 1 M. & A. 60.

(*l*) See *Brown v. Howard*, 2 B. & B. 73; *Clark v. Hougham*, 2 B. & C. 149, 156. And it is no answer — either by way of equitable defence or otherwise — to an action *ex delicto*, that by means of a fraud practised by defendant, the plaintiff was prevented from discovering his cause of action within six years. *Hunter v. Gibbons*, 1 H. & N. 459; *Imperial Gas Light Company v. London Gas Light Company*, 10 Exch. 39; and see *Denys v. Shuckburgh*, 4 Y. & C. 42; *Granger v. George*, 5 B. & C. 149. [But the general and prevailing rule in the United States is, that to a plea of the statute of limitations, in an action on the case for fraud, it is sufficient for the plaintiff to reply generally, that he did not discover the fraud till within six years. *Homer v. Fish*, 1 Pick. 435; *Jones v. Conoway*, 4 Yeates, 109; *Sherwood v. Sutton*, 5 Mason, 143; *Harrell v. Kelly*, 2 McCord, 426; *Croft v. Arthur*, 3 Desaus. 223; *Welles v. Fish*, 3 Pick. (2d ed.) 75, and cases cited in note 1; *Pennock v. Freeman*, 1 Watts, 401; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Gibson v. Fifer*, 21 Texas, 260; *Smith v. Fly*, 24 Texas, 345; *Martin v. Martin*, 35 Ala. 560; *Myers v. Hanlon*, 12 Rich. (S. C.) Eq. 196; *Longworth v. Hunt*, 11 Ohio, N. S. 194; *Kerr F. & M.* 51; *Walsham v. Stainton*, 1 De G., J. & S. 678; *Conyers v. Kenans*, 4 Geo. 308; *Persons v. Jones*, 12 Geo. 371; 1 *Dan. Ch. Pr.* (4th Am. ed.) 645, and notes. This principle has been confirmed by statute in Massachusetts, where the fraud is concealed by the person liable to the action. *Gen. Sts. c. 155, § 12*. In Maine, it

is held, that in order to take the case out of the statute on the ground of undiscovered fraud, there must be proof of actual fraud and concealment by the party to be charged. *Cole v. McGlathry*, 9 Greenl. 131. See *Bishop v. Little*, 3 Greenl. 405. If such proof is furnished, then the party shall derive no benefit from the statute of limitations, unless the creditor has himself direct and ample means, in the exercise of ordinary prudence, to detect the fraud. *McKown v. Whitmore*, 31 Maine, 448. See *Ferris v. Henderson*, 12 Penn. St. 49. But if the party on whom the fraud is practised, had full means of detecting it, the statute of limitations will still run against him. *Farnam v. Brooks*, 9 Pick. 211; *Cole v. McGlathry*, 9 Greenl. 131; *Dodge v. Essex Ins. Co.* 12 Gray, 65, 71. In New York, although the principle is admitted in equity, yet it is held at law, that a replication that the plaintiff did not discover the fraud till within six years, will not deprive the defendant of the protection of the statute of limitations. *Troup v. Smith*, 20 John. 23; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Wend. 202. See, also, *Oothout v. Thompson*, 20 John. 277. In North Carolina and Virginia, this question has been decided as in New York. *Hamilton v. Shepherd*, 2 Murph. 125; *Callis v. Waddy*, 2 Munf. 511. See *Shelby v. Shelby*, Cooke, 183; *Morton v. Chandler*, 8 Greenl. 9; *Payne v. Hathaway*, 3 Vt. 212; *Wamburze v. Kennedy*, 4 Desaus. 474; *Sweat v. Arrington*, 2 Hayw. 129; *Smith v. Bishop*, 9 Vt. 110; *Lewis v. Houston*, 11 Texas, 642. But in a case of a claim for services rendered forty years previously, by a negro, who from ignorance, supposed himself to be a slave, the person to whom the services were rendered having suppressed the truth that he was free, and having falsely asserted that he was a slave, whereby he procured the services of the negro, the demand was held not to be barred by the statute of Pennsylvania.

And in the case of a bond conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture by reason of the non-performance of the first act in the series; yet, if default be made in the performance of subsequent acts, a new cause of action arises on each default, and the statute runs from that. (*m*)

[Courts of equity have no jurisdiction to relieve against the operation of the statute of limitations upon legal claims. (*m*¹) The statutes of limitation, in general, do not apply to equitable claims, as trusts and claims for account; though courts of equity act sometimes by analogy to the statutes of limitations in refusing to entertain equitable claims on the ground of lapse of time and acquiescence. (*m*²) Thus, money deposited with a banker constitutes in law a loan to the banker, which cannot be recovered after six years without some renewal of liability; (*m*³) but in equity the banker would be held to remain a trustee of the amount for the depositor. (*m*⁴) A devise or charge of real estate for the payment of debts, creates a trust for the benefit of the creditors against which the statute does not operate; (*m*⁵) but such devise or charge will not revive a debt previously barred, unless such debt is particularly directed to be paid. (*m*⁶)

A legacy left by the creditor to the debtor may be set off by his executor against a debt barred by the statute of limitation.] (*m*⁷)

3. Of the Revival of the Remedy by an Acknowledgment.

1. We have already said, that although the statute of limitations bars the remedy after six years, the debt itself is not extinguished thereby, and that the debtor may, by a new promise to pay such debt, revive his liability. (*m*⁸) And we now

Lord Tenterden's act.

Ferris *v.* Henderson, 12 Penn. St. 49. Rule in cases of mistake, see 1 Dan. Ch. Pr. (4th Am. ed.) 645; Dodge *v.* Essex Ins. Co. 12 Gray, 65, 71; Hough *v.* Richardson, 3 Story, 659; Thomas *v.* Marshall, 36 Ala. 504.]

(*m*) Amott *v.* Holden, 18 Q. B. 593, 603; Sanders *v.* Coward, 15 M. & W. 48; Blair *v.* Ormond, 17 Q. B. 423.

(*m*¹) [Hovenden *v.* Annesley, 2 Sch. & Lef. 607, 630; 2 Story Eq. Jur. § 1520; Hunter *c.* Gibbons, 1 H. & N. 459; 26 L. J. Ex. 1.]

(*m*²) [2 Story Eq. Jur. §§ 1520, 1520 a;

Stackhouse *v.* Barnston, 10 Ves. 453, 456; Smith *v.* Pococke, 2 Drew. 197; 23 L. J. Ch. 545.]

(*m*³) [Pott *v.* Clegg, 16 M. & W. 321.]

(*m*⁴) [Hollis's case, 2 Vent. 345.]

(*m*⁵) [Hargreaves *v.* Michell, 6 Mad. 326.]

(*m*⁶) [Burke *v.* Jones, 2 Ves. & Bea. 275; and see Williamson & Naylor, 3 Y. & C. Exch. 208, 210, note (*a*).]

(*m*⁷) [Courtenay *v.* William, 3 Hare, 539; Coates *v.* Coates, 33 Beav. 249; 33 L. J. Ch. 448.]

(*m*⁸) [In Farmers' Bank *v.* Clark, 4

Leigh (Virg.), 519, Carr J. speaking of

remark, further, that before the passing of Lord Tenterden's act, (n) a *verbal* admission of the debt, within six years, was held to be sufficient for this purpose.

But, by the first section of that act, it is enacted: "that in actions of debt, (n¹) or upon the case, grounded upon any simple contract, no *acknowledgment or promise by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such *acknowledgment or promise* shall be made or contained by or in some *writing, (o) to be signed by the party chargeable thereby*; and that, where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such *joint contractor, executor, or administrator* shall lose the benefit of the said enactments, or either of them, so as to be *chargeable* in respect or by reason only, of any written *acknowledgment or promise* made and signed *by any other or others of them*: provided always, that *nothing herein* contained shall alter, or take away, or *lessen the effect of any payment* of any principal or interest made by any person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators,

the then recent cases on this subject said: "They consider the acknowledgment a new *promise*, not a continuance of the old." And this he regards as the more rational doctrine. See, also, to the same effect, *Bell v. Morrison*, 1 Peters, 373; *Levy v. Cadet*, 17 Serg. & R. 126; *Searight v. Craighead*, 1 Penn. 135; *Exeter Bank v. Sullivan*, 6 N. H. 134 *et seq.*; *Little v. Blunt*, 9 Pick. 491; *Cady v. Shepherd*, 11 Pick. 408; 2 Phil. Ev. 158; *Angell on Limitations* (4th ed.), § 208 *et seq.*; *Collyer Partn.* § 430, and notes; *Brewster v. Hardeman*, *Dudley (Geo.)*, 138; *Ames v. Le Rue*, 2 McLean, 216; *Kempshall v. Goodman*, 6 McLean, 189; *Downer v. Shaw*, 28 N. H. 151; *Titus v. Ash*, 24 N. H. 319. Per *Abbott C. J.* in *Pittam v. Foster*, 1 B. & C. 248, 250;

Buteman v. Pinder, 3 Q. B. 574. As to the pleadings, see *post*, 1261, note (f¹).]

(n) 9 Geo. 4, c. 14. [Similar statutes have been enacted in most of the American states.]

(n¹) [In *Downer v. Shaw*, 28 N. H. 151, it was held, that in an action of *debt* a subsequent admission or promise would not remove the statute bar. See *Rice v. Wilder*, 4 N. H. 336.]

(o) Accordingly it has been held, since the statute, that a *verbal* order by the trustees of a turnpike road, that money should be raised under their act, for the purpose of paying off the claims of several tradesmen who had been employed by them thereunder, and amongst others, of the plaintiff, did not take his debt out of the operation of the statute. *Emery v. Day*, 1 Cr. M. & R. 245.

shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Section 2 enacts, that "if any defendant or defendants in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Section 3 enacts, that "no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange or other writing, *by or on the behalf of the party to whom such payment shall be made*, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

And section 4 enacts, that "the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of *set-off* on the part of any defendant either by plea, notice, or otherwise."

This statute, it has been said, "did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants; but merely to require a different mode of proof substituting the certain evidence of a writing, signed by the party chargeable, for the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether, in a given case, the written document amounts to an acknowledgment or promise, is no other inquiry than whether the same words if proved, before the statute, to have been spoken by the defendant, would have had a similar operation and effect." (*p*)

(*p*) Per Tindal C. J. *Haydon v. Williams*, 7 Bing. 163, 166. [See *Sigourney v. Drury*, 14 Pick. 388, 389; *Wadsworth v. Thomas*, 7 Barb. 445; *Harbold v. Kuntz*, 16 Penn. St. 210; *Bangs v. Hall*, 2 Pick. 378; *Exeter Bank v. Sullivan*, 6 N. H. 135; *Whitney v. Bigelow*, 4 Pick. 110; *Porter v. Hill*, 4 Greenl. 41; *Deshon*

Intention of
these enact-
ments.

2. The modern cases upon this subject have satisfactorily settled the principles on which an admission of the debt, after the lapse of six years, is allowed to take it out of the operation of the statute of limitations.

What a sufficient acknowledgment.

These principles are chiefly as follow.

First, in order to take a case out of the statute, there must be either an *express promise* to pay, or an acknowledgment or admission of the debt, in terms so distinct and unqualified as that a *promise* to pay, *on request*, may be reasonably *inferred* therefrom. (q)

v. Eaton, 4 Greenl. 413; Russell v. Copp, 5 N. H. 154; Bailey v. Crane, 21 Pick. 324. In Moore v. Bank of Columbia, 6 Peters, 86, it was held that in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed. And this is there said to be the conclusion to which the English cases had come before the late act of 9 Geo. 4, c. 14. For other American cases on this head, see Wetzell v. Bussard, 11 Wheat. 309; Perley v. Little, 3 Greenl. 94; Marshall v. Dalliber, 5 Conn. 480; Lord v. Shaler, 3 Conn. 131; Lyon v. Marclay, 1 Watts, 275; Church v. Feterow, 2 Penn. 305, 306; Olcott v. Scoles, 3 Vt. 73; Russell v. Goss, 1 Mart. & Yer. 270; Young v. Monpoe, 2 Bailey, 278; Oliver v. Gray, 1 H. & Gill, 204; Stanton v. Stanton, 2 N. H. 426; Bell v. Rowland, Hardin, 361; Harrison v. Handley, 1 Bibb, 443; Ormsby v. Letcher, 3 Bibb, 569; Fries v. Boiselet, 9 Serg. & R. 128; Bell v. Morrison, 1 Peters, 361; 2 Stark. Ev. (5th Am. ed.) 472, note, and numerous cases there cited; Arnold v. Dexter, 4 Mason, 122; Sothoron v. Hardy, 8 Gill & J. 133; Buckner v. Johnson, 4 Missou. 100; M'Rae v. Purmont, 16 Wend. 477; Allen v. Webster, 15 Wend. 284; Barrett v. Barrett, 8 Greenl. 353; Brewer v. Brewer, 6 Geo. 587; Ventris v. Shaw, 14 N. H. 422; Kensington Bank v. Patton, 14 Penn. St. 479; Smith v. Leeper, 10 Ired. 86; Richmond v. Fugua, 11 Ired. 445; Brown v. State Bank, 5 Eng. 134; Phelps v. Stewart, 12 Vt. 256; Sherman v. Wakeman, 11 Barb. 254; Patterson v. Cobb, 4 Florida, 481; Ayers v. Richards, 12

Ill. 146; Angell on Limitations (4th ed.), § 208 *et seq.* The acknowledgment must be made voluntarily, and not as a witness. Bloodgood v. Bruen, 4 Selden (N. Y.), 362. A written agreement to waive all defence which a party might otherwise make under the statute of limitations, is not sufficient as an acknowledgment of indebtedness, or as an express promise, to take the case out of the operation of the statute. Warren v. Walker, 23 Maine, 453. The defendant did not, Whitman C. J. said, "agree to waive the defence of payment, or of the non-performance of the services as charged, or indeed of any other defence, which he might have had to the original cause of action. There could not, then, have been implied in the memorandum, any absolute, or even conditional acknowledgment of indebtedness, and much less any absolute or conditional promise to pay the debt." But a party is bound by his written agreement made for a sufficient consideration before the statute could operate as a bar, not to set up the statute of limitations as a defence to a claim against him. Warren v. Walker, 23 Maine, 453; Webber v. Williams College, 23 Pick. 302. But such an agreement, in order to avoid the statute, must be in writing in those states where a written acknowledgment &c., is necessary. Hodgdon v. Chase, 29 Maine, 47. See Hodgdon v. Chase, 32 Maine, 169; Mills v. Wildman, 18 Conn. 124.]

(q) Smith v. Thorne, 18 Q. B. 134, 143; and see Cockrill v. Sparkes, 1 H. & C. 699; per Parke B. Williams v. Griffith, 3 Exch. 335, 342; 18 L. J. Exch. 210, 213; Gardner v. M'Mahon, 3 Q. B. 561; Wal-

And it appears that such a promise to pay will be inferred from an absolute admission of the debt, although such admission be accompanied with a request for indulgence. (*r*)

So, an unqualified admission of the debt will be sufficient to bar the operation of the statute, although the parties may differ as to the amount. (*s*)

So, an absolute admission of some debt being due is sufficient; for such admission may be coupled with evidence to prove the amount. (*t*) And so a general promise to pay, not specifying any amount, but which can be made certain as to the amount by extrinsic evidence, will take the case out of the statute. (*u*)

So where the defendant, having been called upon by a creditor, — who was the holder of two overdue promissory notes made by the defendant, — for a statement of his affairs, made out an account in which the notes were inserted as a debt for which he was

ler *v. Lacy*, 1 M. & G. 54; 1 Scott N. R. 186; *Morrell v. Frith*, 3 M. & W. 402, 405; *Bird v. Gammon*, 5 Scott, 213; *Dabbs v. Humphreys*, 10 Bing. 446.

(*r*) *Cornforth v. Smithard*, 5 H. & N. 13.

(*s*) *Colledge v. Horn*, 3 Bing. 119; *Gardner v. M'Mahon*, 3 Q. B. 561, 568. [See *Davis v. Steiner*, 14 Penn. St. 275; *Mills v. Wildman*, 18 Conn. 124; *Hazlebaker v. Reeves*, 12 Penn. St. 264.]

(*t*) See *Sidwell v. Mason*, 2 H. & N. 306.

(*u*) Per *Alderson B. Spong v. Wright*, 9 M. & W. 629, 633; *Cheslyn v. Dalby*, 4 Y. & C. 238; *Williams v. Griffith*, 3 Exch. 335; *Dickenson v. Hatfield*, 1 Moo. & Rob. 141; *Lechmere v. Fletcher*, 1 C. & M. 623; and see *Edmonds v. Goater*, 21 L. J. C. 290; [*Woodbridge v. Allen*, 12 Met. 470. It is not necessary, in order to revive a debt barred by the statute of limitations, that any specific sum should be acknowledged to be due, as the amount actually due may be proved by extrinsic evidence, provided the acknowledgment is broad enough in its terms to include such debt, and sufficiently particular to show that it was the subject-matter of the acknowledgment. *Barnard v. Bartholomew*, 22 Pick. 291. See, also, *Ilseley v. Jewett*, 2 Met. 168; *Kittredge v. Brown*, 9 N. H. 377; *Dinsmore v. Dinsmore*, 21 Maine,

433. But a mere general admission that something is due, without reference to the particular claim in question, is not sufficient. *Pray v. Garcelon*, 17 Maine, 145. The acknowledgment should be so plain and distinct as to preclude hesitation about the meaning of the party making it. *Magee v. Magee*, 10 Watts, 172. See *Brown v. Bridges*, 2 Miles, 425. The acknowledgment or promise should specify or refer to the particular debt or demand, or cause of action which is sought to be revived. *Martin v. Broach*, 6 Geo. 21; *Robbins v. Farley*, 2 Strobb. 348; *Brailsford v. James*, 3 Strobb. 171; *Davis v. Steiner*, 14 Penn. St. 275; *Arey v. Stephenson*, 11 Ired. 86; *Lockhart v. Eaves*, *Dudley* (S. Car.), 321; *Budingham v. Smith*, 23 Conn. 453; *Shidler v. Brewer*, 23 Penn. St. 413; *Huff v. Richardson*, 19 Penn. St. 388; *Suter v. Sheeler*, 22 Penn. St. 308; *Shaw v. Allen*, *Busbee Law* (N. Car.), 58; *McBride v. Gray*, *Busbee Law* (N. Car.), 420. Where a letter was offered to prove the new promise to pay, it was held to apply to the debt in suit, as there was no evidence of another debt. *Coles v. Kelsey*, 2 Texas, 541. See *Guy v. Tams*, 6 Gill, 82, where it was held to be a question for a jury to decide whether the new promise applied to the demand in suit.]

liable ; this was held to be sufficient to take the case out of the statute. (x)

And it has been held, that an entry in a bankrupt's examination, of a certain sum being due to A., is a sufficient acknowledgment to take the case out of the statute, in an action against the bankrupt. (y)

But although, where there is a distinct and unequivocal acknowledgment, and nothing more, a promise to pay may and ought to be implied ; yet where the party guards his acknowledgment, this implication will not arise. (z)

Qualified
acknowledgment.

Thus, although there be the most distinct admission of the debt, yet if it be accompanied by a *refusal* to pay, the statute will not be barred ; for such refusal prevents the implication of a promise arising from the acknowledgment. (a) And so, if there be an acknowledgment accompanied by a *conditional promise* to pay, no *absolute* promise can be implied from such acknowledgment. (b)

(x) *Holmes v. Mackreth*, 3 C. B. N. S. 789.

(y) *Eicke v. Nokes*, 1 Moo. & Rob. 360. But see *Everett v. Robertson*, 1 E. & E. 16, where it was held that the insertion of the debt by the defendant, in an account of his debts brought in on a petition for an arrangement, under 7 & 8 Vict. c. 70, did not take such debt out of the statute ; and see *Ex parte Topping*, 34 L. J. Bank. 44 ; [*Brown v. Bridges*, 2 Miles, 424 ; *Christy v. Flemington*, 10 Barr, 120. Charges made annually by the treasurer against himself, in the books of a corporation, for annual interest on a debt due from him, are recognition of the debt which take it out of the statute. *Bluehill Academy v. Ellis*, 32 Maine, 260.]

(z) See *Buckmaster v. Russell*, 10 C. B. N. S. 745.

(a) Per Tindal C. J. *Linley v. Bonsor*, 2 Scott, 399, 403 ; *A'Court v. Cross*, 3 Bing. 328 ; *Tanner v. Smart*, 6 B. & C. 603 ; *Brigstocke v. Smith*, 1 C. & M. 483 ; per Bosanquet J. *Kennet v. Milbank*, 8 Bing. 38, 42. The following had been previously held, and they would certainly be now considered to be *insufficient acknowledgments* : " I must refer you to Messrs. C. my solicitors, whose opinion

always governs me ; they are in possession of my determination and ability." *Bicknell v. Keppell*, 1 N. R. 20. " I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. & R. 267 ; *Craig v. Cox*, Holt N. P. 380. " I owe you not a farthing, for it is more than six years since." *Coltman v. Marsh*, 8 Taunt. 380. " I thought it had been settled at the time, but I have been in so much trouble since, that I cannot recollect anything about it." *Hellings v. Shaw*, 7 Taunt. 608. " The testator always promised not to distress me for it ; " held to be no evidence of a promise to *him*. *Ward v. Hunter*, 6 Taunt. 210. One of several executors said, " I believe the debt to be a just one, but I cannot do anything without the consent of the testator's family ; " held insufficient. *M'Culloch v. Dawes*, 9 D. & R. 40. " I cannot afford to pay my new debts, much less my old ones." *Knott v. Farren*, 4 D. & R. 479.

(b) Per Tindal C. J. *Linley v. Bonsor*, 2 Scott, 399, 403 ; and see *Evans v. Simon*, 9 Exch. 282 ; [*Betton v. Cutts*, 11 N. H. 170 ; *Manning v. Wheeler*, 13 N. H. 486 ; *Butterfield v. Jacobs*, 15 N. H. 140 ; *Bullock v. Smith*, 15 Geo. 395 ; *Bloodgood v. Bruen*, 4 Selden (N. Y.), 362. Where the

So the giving of a bill or note, in renewal of a former bill or note given as a security for money lent, is not sufficient, of itself, to take the case out of the statute as to the original demand. (*c*)

And so, where there is an acknowledgment which *primâ facie* satisfies the statute, but other evidence is given which shows that the document was drawn up for a different purpose, a promise to pay will not be implied therefrom. (*d*)

It is impossible to lay down any general rule which will govern all the cases on this subject; (*e*) and it would not be consistent with the limits and object of this work to cite, at length, the various decisions which have taken place with reference thereto. But the following cases will serve to show the leading principles, on which acknowledgments have been held to be insufficient to bar the operation of the statute.

Thus, in the case of *A'Court v. Cross*, (*f*) it appeared that the defendant, on being arrested for a debt more than six years old, said, "I know that I owe the money; but the bill I gave is on a threepenny receipt stamp, and I will never pay it:" and the court held, that the defendant's assertion, "that he would never pay," repelled the inference of a promise, and neutralized the effect of the acknowledgment, so that the statute was not barred.

So in *Tanner v. Smart*, (*g*) — which was an action on a promissory note, to which the statute of limitations was pleaded, — the defendant was proved to have said, "I cannot pay the debt at present, but I will pay it *as soon as I can*;" and it was held that, as no proof was given of the defendant's ability to pay, the statute was a bar. (*g*¹)

maker of the note said that he owed the debt, but was unable to pay it, and that he was determined to pay it; this was held not to be evidence of an unconditional promise to pay. *Atwood v. Coburn*, 4 N. H. 315. See *Thayer v. Mills*, 14 Maine, 300; *Lombard v. Pease*, 14 Maine, 349; *Brooks v. Chesley*, 4 Gill, 205; *Kensington Bank v. Patton*, 14 Penn. St. 479.]

(*c*) *Foster v. Dawber*, 6 Exch. 839; 20 L. J. Exch. 385.

(*d*) *Cripps v. Davies*, 12 M. & W. 159, 169; and see *Cockrill v. Sparkes*, 1 H. & C. 699; [*Wellman v. Southard*, 30 Maine, 425.]

(*e*) Per *Williams J.* *Gardner v. M'Mahon*, 3 Q. B. 461, 568.

(*f*) 3 Bing. 328. See, also, *Rawcroft v. Lomas*, 4 M. & S. 457.

(*g*) 6 B. & C. 603; and see *Scales v. Jacob*, 3 Bing. 638; *Ayton v. Bolt*, 4 Bing. 105.

(*g*¹) [*Sherman v. Wakeman*, 11 'Barb. 254; *Tompkins v. Brown*, 1 Denio, 247; *Farmers' Bank v. Clark*, 4 Leigh, 519. But see *Cummings v. Gassett*, 19 Vt. 308; *Butterfield v. Jacobs*, 15 N. H. 140. In this last case the debtor said he would go to work at his trade, and would pay the debt as fast as he could; and this was held to be an absolute promise, taking the debt

So in *Fearn v. Lewis*, (*h*) in answer to a plea of the statute of limitations, two letters of defendant were produced, containing the following observations: "Plaintiff's claim with that of others shall receive that attention that, as an honorable man, I consider them to deserve, and it is my intention to pay them; . . . I must be allowed time to arrange my affairs. If I am proceeded against, any exertion of mine will be rendered abortive." "I am ready and willing to do anything and everything to satisfy Mr. F. and all my creditors; and my only regret is, that by the way my father has left me, I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, &c.; and if I am put in prison, not one penny will my creditors ever receive; if my person is laid hold of, I never will put in bail, but surrender:" and it was held, that the above letters were not sufficient to bar the statute; inasmuch as they did not "import such a direct and unqualified acknowledgment of a debt, as would authorize the court in implying a promise to pay."

And upon the same principle it was held, in *Brigstocke v. Smith*, (*i*) that the following letter was not sufficient to take the case out of the statute: "In reply to your application of the 19th instant, for the payment of 89*l.* 10*s.* 11½*d.* to Mr. D. Brigstocke, I beg to say that it is a claim I am by no means prepared to admit to the full extent; and to make the following observations respecting it: Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished between 1817 and 1824, a period during which I was concerned in two successive partnerships, to one or other of whom, the accounts Mr. B. was entitled to recover ought to have been charged. Having at different times wound up both those concerns, and quitted Carmarthen as long back as the year 1824, I was surprised to receive Mr. B.'s bill in 1829, five years afterwards; and it is certainly not a little strange, that he should then send in a charge of so old a debt, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow that I am liable to pay any part of the account previous to the year 1825; but, as I anticipate being

out of the statute. So, where the debtor said he had not the money, but would pay the note as soon as he could, this was held

an absolute promise. First Cong. Soc. in *Lyme v. Miller*, 15 N. H. 520.]

(*h*) 6 Bing. 349.

(*i*) 1 C. & M. 483.

in Carmarthen shortly, I will communicate with Mr. B. personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of Robert Smith & Co., to be done at the works at Carmarthen in 1827, together with a few items for glazing, in the year 1825, making together 20*l.* 17*s.* 5*d.*, which I believe to be correctly charged, and for which I inclose a check, and will thank you to acknowledge the receipt of it ;” and Bayley B. : said “In the present case there is a letter acknowledging that the plaintiff makes a demand, but not acknowledging the propriety of the demand, and *denying all liability* on his part to make the payment. I think, where there is such a denial, I cannot make the implication of a promise to pay.”

So in *Spong v. Wright*, (*k*) an admission in the following terms : “I have to request you will be pleased to send me in any bill, or what demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law,” — was held not to be sufficient to take the case out of the statute. So a letter which admits a debt, but which is expressed to be written “without prejudice,” is not a sufficient acknowledgment to bar the statute. (*l*) So, where the defendant wrote to the clerk of the plaintiff as follows : “I will not fail to meet the plaintiff on fair terms, and have now a hope that, before perhaps a week from this date, I shall have it in my power to pay him, at all events a portion of the debt, when we shall settle about the liquidation of the balance ;” this was held not to be sufficient to take the case out of the statute. (*m*) And so it would seem, that the mere expression by the debtor, of a wish or promise not to avail himself of the statute, is not a sufficient acknowledgment to prevent the operation thereof. (*n*)

So it appears that a direction for the payment of debts, or a devise in trust for the payment of debts in a will of personal estate, will not prevent the operation of the statute, or revive a debt on which the statute had attached before the death of the testator. (*o*) And so it has been held, that a debt bearing interest, is not taken out of the statute, by an engagement, signed by the debtor, to

(*k*) 9 M. & W. 629.

(*l*) *Cory v. Bretton*, 4 C. & P. 462.

(*m*) *Hart v. Prendergast*, 14 M. & W. 741.

(*n*) *Rackham v. Marriott*, 1 H. & N. 234.

(*o*) *Freako v. Cranefeldt*, 3 My. & Cr.

499; *Evans v. Tweedy*, 1 Beav. 55; *Burke v. Jones*, 2 V. & B. 275; [*Carrington v. Manning*, 13 Ala. 611; *Murray v. Mechanics' Bank*, 4 Edw. Ch. 567; *Walker v. Campbell*, 1 Hawks, 304.] But see *Jones v. Scott*, 1 Russ. & My. 255.

charge his estate with a sum corresponding in amount with such debt, together with interest from the date of the engagement. (*p*)

In like manner, — on the principle that an admission, to take a debt out of the statute of limitations, must be of such a nature that a promise can be implied therefrom, — those cases in which debtors have admitted the original claim, but have *denied* that a *liability* existed at *the time of the admission*, because the debt had been paid; (*q*) or because there was a set-off against it; (*r*) or because the six years had expired, (*s*) are clearly good law.

And it appears that, upon the same principle, an admission will not be effectual to take the case out of the statute, when it is qualified by an objection which would *at any time* have exempted the party from payment; (*t*) or accompanied by a claim to be *discharged* from the debt, even upon some ground which may be shown not to be sufficient for that purpose. (*u*)

So if a cause of action, arising from the breach of a contract to do an act at a specified time, be once barred by the statute of limitations, a subsequent acknowledgment by the party that he *broke* the contract, will not take the case out of the statute. (*x*)

Nor will an acknowledgment of the debt bar the statute, if it be not made before action brought, such acknowledgment being equivalent to a new promise. (*y*)

Must be before action.

(*p*) *Martin v. Knowles*, 1 N. & M. 421. [But if the maker of a note, which has run long enough to be barred by the statute of limitations, but which is unpaid and due, gives a mortgage to secure the payment of it, he waives the benefit of the statute, and the mortgage is a valid security. *Merrills v. Swift*, 18 Conn. 257.]

(*q*) *Birk v. Guy*, 4 Esp. 184; *Swann v. Sowell*, 2 B. & Ald. 759. But see *Boydell v. Drummond*, 2 Camp. 161; *Craig v. Cox*, Holt N. P. R. 381. [See *Dickinson v. McCarney*, 5 Geo. 486; *Carruth v. Paige*, 22 Vt. 179.]

(*r*) *Swann v. Sowell*, 2 B. & Ald. 759; and see *Francis v. Hawkesley*, 1 E. & E. 1052; [*Davidson v. Morris*, 5 Sm. & M. 564; *Lafarge v. Jayne*, 9 Barr, 410.]

(*s*) *Coltman v. Marsh*, 3 Taunt. 380; *Bryan v. Horsman*, 5 Esp. 81; *Rawcroft v. Lomas*, 4 M. & S. 457; *Snook v. Mears*, 5 Price, 636; *Leaper v. Tatton*, 16 East, 421.

(*t*) *De la Torre v. Barclay*, 1 Stark. 7.

(*u*) See *Owen v. Woolley*, Bull. N. P. 168; *Goate v. Goate*, 1 H. & N. 29; overruling *Partington v. Butcher*, 6 Esp. 66; *Hellings v. Shaw*, 7 Taunt. 608; *Beale v. Nind*, 4 B. & Ald. 568, 571, 572, note (*a*).

(*x*) *Boydell v. Drummond*, 2 Camp. 160; *Hurst v. Parker*, 1 B. & Ald. 92; *Short v. M'Carthy*, 3 B. & Ald. 626; *Whitehead v. Howard*, 2 B. & B. 372; *Gibbons v. M'Casland*, 1 B. & Ald. 691, 692.

(*y*) *Bateman v. Pinder*, 3 Q. B. 574; overruling on this point *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Illingworth*, 2 B. & C. 825. [Such is clearly the true principle upon this subject; *ante*, 1236, note (*m*⁸); *Ellicott v. Nichols*, 7 Gill, 85; *Winggan Indigo Society v. Kidd*, Dudley (S. Car.), 115; *Brewster v. Hardeman*, Dudley (Geo.), 138; *Reigne v. Desportes*, Dudley (S. Car.) 118; *Martin v. Broach*, 6 Geo. 21; *post*, 1261, note (*f*¹); *Angell* on

Where the defendant's promise is conditional, or where it is a promise to pay on the arrival of a specified time, the performance of the condition, or the arrival of that time, must be proved by the plaintiff. (z) But where A., — who had signed, as surety for B., a joint and several promissory note made by A. and B., — being called upon, after the death of B., for payment of the money due thereon, requested the holder to apply to B.'s executrix, and stated in writing, that "what she should be short, he would assist to make up;" and the executrix was applied to, but did not pay anything: it was held that A.'s conditional promise thereby became absolute, and rendered him liable in an action brought against him on the note more than six years after its date, and after a reasonable time had elapsed for payment by the executrix. (a)

And it would now appear to be decided, that the question as to whether a written acknowledgment, which is offered in evidence to take a case out of the statute, is conditional or unconditional, is a question for the court, and not for the jury, except where the document is connected with other evidence, which affects its construction. (b)

Limitations (4th ed.), § 208 *et seq.* Although some cases seem to be *contra*; *Ilsley v. Jewett*, 3 Met. 439; *Love v. Hackett*, 6 Geo. 486; *Newlin v. Duncan*, 1 Harring. 204; *Guy v. Tams*, 6 Gill, 82; *Titus v. Ash*, 24 N. H. 329, 330. The promise of a debtor to pay a debt, which has been extinguished by a release from the creditor, is a new contract, and does not revive the original debt. *Stearns v. Tappin*, 5 Duer (N. Y.), 294.]

(z) *Hart v. Prendergast*, 14 M. & W. 741, 745; *Tanner v. Smart*, 6 B. & C. 603; *Haydon v. Williams*, 7 Bing. 163. [See *Warren Academy v. Starrett*, 15 Maine, 443; *Read v. Wilkinson*, 2 Wash. 514; *M'Lellan v. Albee*, 17 Maine, 184; *Angell Lim.* §§ 235-239, 280; *Betton v. Cutts*, 11 N. H. 170.]

(a) *Humphreys v. Jones*, 14 M. & W. 1. [Where the defendant said, that "he owed the plaintiff, and intended to arrange his business and pay him that fall or winter, as soon as he could," it was held that, upon the expiration of the ensuing winter, the

acknowledgment became unconditional, and was sufficient to revive the remedy for the recovery of a debt barred by the statute of limitations. *Watkins v. Stevens*, 4 Barb. 168.]

(b) *Routledge v. Ramsay*, 8 A. & E. 221; *Morrell v. Frith*, 3 M. & W. 402. [See *Mumford v. Freeman*, 8 Met. 432. In *Miller v. Lancaster*, 4 Greenl. 159, it was decided that it is not within the province of the jury to determine what acts or declarations amount to a new promise. See, also, *Snook v. Mears*, 5 Price, 638; *Boyd v. Grant*, 13 Serg. & R. 124; *semb. acc.* So, in *Oliver v. Gray*, 1 H. & Gill, 204, it was held, that it is for the court to decide what kind of promise or acknowledgment is sufficient to take a case out of the act of limitations, and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury as in other cases, under the direction of the court. *Martin v. Broach*, 6 Geo. 21; *Love v. Hackett*, 6 Geo. 486. In *Gould v. Shirley*, 2 Moore & P. 583, it was

If a written acknowledgment, produced for the purpose of taking a case out of the statute, contain no date, parol evidence may be given of the time at which it was written. (*c*)

Parol evidence of date, or contents.

And if the writing which contains the acknowledgment has been lost, parol evidence may be given of its contents. (*d*)

3. Before the statute 9 Geo. 4, c. 14, it was held, that the admission of the debt by the authorized agent of the debtor; (*e*) or by a third party, to whom he referred the creditor for information respecting his demand; (*f*) or by the wife of a debtor who was accustomed to conduct his business; (*g*) or by his counsel at the trial, in his hearing; (*h*) was sufficient to revive the remedy. (*h*¹)

By whom the acknowledgment may be made.

But, under that statute, it was held that the written acknowledgment which is required to take a case out of the statute of limitations, must bear the actual signature of the party chargeable thereby. (*i*)

Thus, where an unsigned letter, written and sent by the direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, contained an admission of a debt of the bankrupt, this was held not to take such debt out of the statute as against the assignees. (*k*)

Now, however, by the 19 & 20 Vict. c. 97, s. 13, an acknowledgment under the 9 Geo. 4, c. 14, ss. 1, 3, will be sufficient, if it be in writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment.

19 & 20 Vict. c. 97, s. 13.

said by Best C. J. that where the terms of an acknowledgment of a debt barred by the statute are ambiguous, *their meaning and effect* are questions for the jury.]

(*c*) *Edmonds v. Downes*, 2 C. & M. 459, 463.

(*d*) *Haydon v. Williams*, 7 Bing. 163.

(*e*) *Burt v. Palmer*, 5 Esp. 145.

(*f*) *Williams v. Innes*, 1 Camp. 364.

(*g*) *Anderson v. Sanderson*, Holt N. P. 91. See *Gregory v. Parker*, 1 Camp. 394.

(*h*) *Colledge v. Horne*, 3 Bing. 119. See now, *Kennett v. Milbank*, 8 Bing. 40, 41.

(*h*¹) [If a creditor, whose debt is barred

by the statute, be appointed executor or administrator of the debtor, he cannot revive the debt, because he cannot make a promise to himself. *Richmond Adm'r, Pet'r*, 2 Pick. 567. Neither has he any right to retain for such a debt, notwithstanding a provision in the will for the payment of all *just debts*, and that even in a case of a parent and child. *Rogers v. Rogers*, 3 Wend. 503.] As to an acknowledgment or promise by an executor or administrator, see *Angell on Limitations* (4th ed.), § 263 *et seq.*

(*i*) *Hyde v. Johnson*, 3 Scott, 289.

(*k*) *Pott v. Clegg*, 16 M. & W. 321;

What a sufficient signature. And where the whole document is in the handwriting of the defendant, his name, written at the top, will be a sufficient signature to bind him. (*l*)

It will also be remembered that the statute expressly provides, that even a written acknowledgment of the debt by one of two joint contractors or executors, shall not revive the remedy as against the other, (*l*¹) and that, if they be sued

and see *Whippy v. Hillary*, 3 B. & Ad. 399.

(*l*) *Holmes v. Mackrell*, 3 C. B. N. S. 789.

(*l*¹) [In the State of Connecticut, it has been held, that the acknowledgment of one of several joint makers of a promissory note, will take it out of the statute as against the others. *Bound v. Lathrop*, 4 Conn. 336; *Caldwell v. Sigourney*, 19 Conn. 37. It was said, however, that this is true only where the acknowledgment is made under such circumstances, as to entitle it to its full weight. For, although such evidence is in all cases *admissible* for such a purpose, it will not in all cases be *sufficient*. *Coit v. Tracy*, 8 Conn. 268. Therefore, where there was a joint indebtedness by A. and B. to C., growing out of an agency conducted by A. and B. jointly; and more than twenty years after such evidence was ended, B. made an acknowledgment of the debt, and then, at his own expense, and with a view to obtain an advantage himself, by a recovery against A., procured a suit to be brought in the name of C., against A. and himself; it was held, that the acknowledgment of B. under such circumstances, was not sufficient to remove the bar of the statute of limitations set up by A. *Ib.* The same distinction between the *admissibility* and the *sufficiency* of evidence, was made in the case of *Peck v. Botsford*, 7 Conn. 172; in which it was held, that an acknowledgment by a personal representative of a deceased person, that a demand against the estate of the deceased barred by the statute, is due, will not take the case out of the statute. It was held in Massachusetts, that the acknowledgment by one of several joint promisors or debtors, would

take the case out of the statute as to the others, in *Hunt v. Bridgham*, 2 Pick. 581; *White v. Hale*, 3 Pick. 291; *Frye v. Barker*, 4 Pick. 382; *Sigourney v. Drury*, 14 Pick. 387. So in Maine, in *Getchell v. Heald*, 3 Greenl. 26; *Pike v. Warren*, 15 Maine, 390; *Greenleaf v. Quincy*, 3 Fairf. 11; *Dinsmore v. Dinsmore*, 21 Maine, 433; *Shepley v. Waterhouse*, 22 Maine, 497. So in Georgia, in *Cox v. Bailey*, 9 Geo. 467. So in Vermont, in *Joslyn v. Smith*, 13 Vt. 353; *Wheelock v. Doolittle*, 18 Vt. 440. In other courts, however, the contrary rule has prevailed, and in them it has been decided that the acknowledgment of a debt by one of several joint promisors or debtors, is not sufficient to take the case out of the statute as to the others. *Arnold v. Dexter*, 4 Mason, 122; *Bell v. Morrison*, 1 Peters, 351, 373; *Searight v. Craighead*, 1 Penn. 135; *Levy v. Cadet*, 17 Serg. & R. 126; *Collyer Partn.* § 430, and notes and cases cited; *Ellicott v. Nichols*, 7 Gill, 85; *Van Kenren v. Parmelee*, 2 Comst. 523; *Bogert v. Vermilyea*, 10 Barb. 32; *Shoemaker v. Benedict*, 1 Kernan, 176. See *Cady v. Shepherd*, 11 Pick. 400; *Hopkins v. Banks*, 7 Cowen, 653; *Shelton v. Cocke*, 3 Munf. 191; *Hathaway v. Haskell*, 9 Pick. 42; *Coit v. Tracy*, 9 Conn. 1; *Austin v. Bostwick*, *Ib.* 496; *Ward v. Howell*, 5 Harr. & J. 60; *Patterson v. Choate*, 7 Wend. 441; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Whipple v. Stevens*, 22 N. H. 219; *Belote v. Wynne*, 7 Yerger, 534; *Angell on Limitations* (4th ed.), § 248 *et seq.* In some cases it has been held that a promise by one partner, after the period of the statute had run, and after the dissolution, would not revive the debt against his co-partner; but that it would revive the debt

jointly, the plaintiff may recover in such action, against the defendant who has acknowledged the claim; and that the other defendant shall have a verdict. (m) So where, in an action against two, it appeared that one had promised, in writing, to pay "*his proportion of the debt when applied to*;" the court held that, having reference to the terms of such promise, the plaintiff could not, in an action on the original joint cause of action, recover even against the party who made it. (n) But an action having been subsequently brought against that party, and he having been declared against, specially, on his conditional promise to pay his *share* of the debt *when applied to*; it was decided, that such written promise was binding, and that the action was well brought, although the memorandum did not mention the defendant's proportion of the debt; and although, in the former action, he had recovered a verdict and judgment on the pleas of the general issue and statute of limitations, and the plaintiff had had a verdict and judgment against the other defendant upon the general issue. (o)

And a written acknowledgment of a debt by an infant, will take such debt out of the operation of the statute, provided it was incurred for necessities. (p)

Acknowledgment by infant.

4. Before the passing of the 9 Geo. 4, c. 14, it was held, that an acknowledgment, to take a debt out of the statute of limitations, need not be made to the creditor himself, nor even to his agent or servant. (p¹)

To whom the acknowledgment may be made.

though made after dissolution, if before the period of limitation had expired. *Brewster v. Hardeman*, Dudley (Geo.), 138; *Fellows v. Guimarin*, Ib. 100; *Steele v. Jennings*, 1 McMullan, 297. See *Muse v. Donaldson*, 2 Humph. 166; *M'Intire v. Oliver*, 2 Hawks, 209; *Walton v. Robinson*, 5 Ired. 341. The law, in reference to the effect of an acknowledgment by one joint debtor, has been changed by statute in Massachusetts, so as to conform to the English statute referred to in the text. See *Rev. Stat. of Mass. c. 120, § 14 et seq.*; *Gen. Sts. c. 155, s. 13*. So has the law of Maine, *Rev. Stat. of Maine, c. 146, §§ 20, 24.*

(m) Sects. 1, 2.

(n) *Lechmere v. Fletcher*, 1 C. & M. 623, 626, note (a).

(o) *Lechmere v. Fletcher*, 1 C. & M. 623.

(p) *Willins v. Smith*, 4 E. & B. 180. [A spendthrift under guardianship acknowledged and promised to pay a debt contracted by him before the guardianship commenced; this was held insufficient to take the case out of the statute of limitations. *Manson v. Felton*, 13 Pick. 206. A promise by his guardian will bind him. *Ib.*; *Hannum's Appeal*, 9 Barr, 47.]

(p¹) [It has been held that an acknowledgment, to take a case out of the act of limitations, need not be made to the plaintiff, but may be made to anybody else (*Oliver v. Gray*, 1 H. & Gill, 204), in the plaintiff's absence; *Whitney v. Bigelow*, 4 Pick. 110; *Soulder v. Van Rensselaer*, 9 Wend. 293; *St. John v. Garow*, 4 Porter,

Thus, in a case before Lord Kenyon at nisi prius, (*q*) the plaintiff—in order to prove an acknowledgment of a debt by the defendant within six years, in answer to a plea of the statute of limitations—called a witness to whom the defendant was also indebted, and to whom, having called on the defendant for money, the latter said: “I suppose you want money, but I cannot pay you; I must pay Mr. *Peters* (the plaintiff) first, and then I’ll pay you;” and his lordship held that this acknowledgment took the case out of the statute. So where A., by means of misrepresentation, received of B. and several other persons, who were his, A.’s, tenants, various sums of money to which he was not entitled; and, on B. remonstrating that he and the other tenants had paid more than was due, A. stated to B., that if there was any mistake it should be rectified; it was held, that this obviated the statute as to the payments made by the other tenants, as well as by B. (*r*) So an acknowledgment of a debt due to the plaintiff, in a deed made between the debtor and third persons, and to which the plaintiff was a stranger, was held to be sufficient to defeat the operation of the statute. (*s*)

And in an action against A., on the joint and several promissory note of himself and B., it was held to be enough, in order to take the case out of the statute, to give in evidence a letter, written by A. to B. within six years, desiring him to settle the demand. (*t*)

But it has been questioned whether, since the 9 Geo. 4, c. 14, a written acknowledgment of the debt, by the debtor to a third person, is sufficient to bar the statute; (*u*) although certainly if, as was said by Lord Chief Justice Tindal, the object of the 9 Geo. 4,

223; *Watkins v. Stevens*, 4 Barb. 168; *Carshore v. Huyck*, 6 Barb. 583; *Bloodgood v. Bruen*, 11 Barb. 427; *Philips v. Peters*, 21 Barb. 351; *Angell on Limitations* (4th ed.), § 269. But see *Bloodgood v. Bruen*, 4 Selden (N. Y.), 362. A new promise, made after the death of the creditor, and while there is no administrator on his estate, may be given in evidence upon a declaration founded on the original demand, without any averment of the new promise, even if it be conditional. *Betton v. Cutts*, 11 N. H. 170. If a negotiable note be negotiated after the expiration of six years, in an action upon it by the indorsee, he may avail himself of a promise made to the promisee before the transfer, in order to save it from the statute. *Frye*

v. Barker, 4 Pick. 582; *Little v. Blunt*, 9 Pick. 488; *Dean v. Hewett*, 5 Wend. 257; *Howe v. Thompson*, 2 Fairf. 152; *Bird v. Adams*, 7 Geo. 505. But it is settled in Pennsylvania, that the new promise or acknowledgment must be made to the creditor or his agent. *Farmers’ & Mechanics’ Bank v. Wilson*, 10 Watts, 261; *Morgan v. Walton*, 4 Penn. St. 323; *Christy v. Flemington*, 10 Penn. St. 129.]

(*q*) *Peters v. Brown*, 4 Esp. 46.

(*r*) *Clark v. Hougham*, 2 B. & C. 149.

(*s*) *Mountstephen v. Brooke*, 3 B. & Ald. 141.

(*t*) *Halliday v. Ward*, 3 Camp. 32.

(*u*) Per Alderson B. *Grenfell v. Girdlestone*, 2 Y. & C. 662, 676; and the point

c. 14, was merely to substitute the "certain evidence of a writing signed by the party chargeable, for the insecure and precarious testimony to be derived from the memory of witnesses," (*x*) it might be very fairly contended, that the writing, if signed by the party chargeable as required by that act, could lose none of its validity, merely from the fact of its having been addressed to a third party. (*y*)

It is likewise *vexata quæstio*, whether an acknowledgment in writing, given by the maker to the payee of a promissory note, can be made available to defeat the statute, in an action by a subsequent party to the note. (*z*) But it is clear that an acknowledgment by the acceptor of a bill of exchange, within six years, of his liability on the bill to the *payee* thereof, but accompanied with a declaration that he was not liable to the *drawer*, there being no consideration for the acceptance, would not be sufficient to take the case out of the statute, in an action by the latter against the acceptor; for the admission could not inure to the benefit of a party whose claim the defendant denied. (*a*)

5. Where A. has an account against B., some of the items of which are more than six years old; and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in favor of A.; this amounts to an agreement to set off B.'s claim against the earlier items of A.'s; and, out of this agreement, a new consideration arises for the payment of the balance, which takes the case out of the statute of limitations. (*b*)

Effect of stating account and promise to pay balance.

But the mere statement of an account, and promise to pay the balance, will not have this effect. And, therefore, where the items of an account are beyond six years, and there are not mutual or cross accounts between the parties, and they meet and go into the account, and strike a balance, an action will not lie on the count on an *account stated*, to recover such balance. (*c*)

was raised but not decided, in *Howcutt v. Bonser*, 3 Exch. 491, 500.

(*x*) *Haydon v. Williams*, 7 Bing. 163, 166.

(*y*) But see, per Martin and Bramwell BB. *Godwin v. Culley*, 4 H. & N. 373, 379, 380.

(*z*) See *Cripps v. Davis*, 12 M. & W. 159; *Patterson J. in Gale v. Capern*, 1 A.

& E. 102, 104, expressed an opinion that it might. [So it has been held in *Frye v. Barker*, 4 Pick. 582; *Little v. Blunt*, 9 Pick. 488; *Dean v. Hewett*, 5 Wend. 257; *Howe v. Thompson*, 2 Fairf. 152; *Bird v. Adams*, 7 Geo. 505.]

(*a*) *Easterly v. Pullen*, 3 Stark. 186.

(*b*) *Ashby v. James*, 11 M. & W. 542.

(*c*) Per Alderson B. *Ashby v. Jame*

6. It will be remembered that the statute 9 Geo. 4, c. 14, s. 1, provides, "that nothing therein contained shall *alter* or *take away*, or *lessen* the effect of any *payment* of any principal or interest made *by any person*." (c¹)

Therefore, since that act, (d) as well as before, (e) *part payment* of a debt revives the claim as to the residue; and the reason is, because such part payment is evidence of a fresh promise. (f)

And part payment to an agent, will take the debt out of the statute as against the principal. (g)

But in order that a payment may have this effect, it must appear, either by the declaration or by the acts of the party making it, or by the appropriation of the party in whose favor it is made, to have been made in part payment of the debt in question. And if it stand ambiguous whether it be a part payment of an existing debt, or a payment generally, without the admission of any greater debt being due to the party, then it is not sufficient to bar the statute. (h)

So, where there are two clear undisputed debts, and there is

supra; Jones v. Rider, 4 M. & W. 32; overruling Smith v. Forty, 4 C. & P. 126.

(c¹) [The court cannot imply a promise, so as to take the contract out of the operation of the statute of limitations, as an inference of law, from the payment of a part of the debt; but the evidence should be submitted by the court to the jury, with proper instructions to enable them to do it. White v. Jordan, 27 Maine, 370; State Bank v. Wooddy, 5 Eng. 638; Smith v. Westmoreland, 12 Sm. & M. 663. "Partial payments are only available as facts, from which an admission of the entire debt and a present liability to pay may be inferred." Allen J. in Shoemaker v. Benedict, 1 Kernan (N. Y.), 176. See Bowker v. Harris, 30 Vt. 424.]

(d) Wyatt v. Hodson, 8 Bing. 309; Bealey v. Greenslade, 2 C. & J. 61; Chippendale v. Thurston, 4 C. & P. 98; Moo. & M. 411.

(e) Whitcomb v. Whiting, 2 Doug. 652; Burleigh v. Stott, 8 B. & C. 36; Pease v. Hirst, 10 B. & C. 122.

(f) Per Parke J. Gowan v. Forster, 3 B. & Ad. 507, 511. [See Angell on Lim.

(4th ed.) § 240 *et seq.*; White v. Jordan, 27 Maine, 370; Shoemaker v. Benedict, 1 Kernan (N. Y.), 176; Smith v. Westmoreland, 12 Sm. & M. 663; Carshore v. Huyck, 6 Barb. 583; Whipple v. Stevens, 22 N. H. 226; Sigourney v. Drury, 14 Pick. 387; Bell v. Morrison, 1 Peters (U. S.), 351; Exeter Bank v. Sullivan, 6 N. H. 124. An action on a witnessed note, on which a partial payment has been made within twenty years from its date, is not barred by the statute of limitations of Maine, until twenty years after such payment. Estes v. Blake, 30 Maine, 16.]

(g) See Megginson v. Harper, 2 C. & M. 322; [Hill v. Kendall, 25 Vt. 528. As to an acknowledgment or part payment to an administrator, see Baxter v. Penningman, 8 Mass. 133; Jones v. Moore, 5 Binn. 573; Angell on Limitations (4th ed.), § 263 *et seq.*]

(h) Per Cur. Waugh v. Cope, 6 M. & W. 824, 829; Tippetts v. Heane, 1 Cr. M. & R. 252; Mills v. Fowkes, 7 Scott, 444; and see per Cur. Burkitt v. Blanchard, 3 Exch. 89, 91.

evidence of a part payment, within six years, not specifically appropriated to the one debt or the other ; it would seem to be a question for the jury, whether such payment was not applicable to both debts. (*i*)

Rule where there are two undisputed debts.

And if the fact of such part payment be proved, the appropriation thereof to any particular debt for the purpose of taking it out of the statute, may be shown by any medium of proof, *e. g.* by proof that the debtor afterwards admitted, orally, that he had made the payment on account of such debt. (*k*)

So, if the fact of a part payment by the defendant be proved by an admission in writing, signed by him, and there be evidence of a subsequent declaration by the defendant as to the account on which such payment was made ; it is for the jury to say, on the whole facts of the case, on what account such payment really was made. (*l*) But if there be evidence that the payment was accompanied by such declaration, it will be qualified thereby. (*l*)

Where, however, there are two debts, one of which is disputed and the other undisputed, and a part payment is made by the defendant to the plaintiff ; the jury will, in the absence of any proof of its having been made specifically on account of either debt, be warranted in inferring that it was made on account of that one which was undisputed. (*m*) So, where there are two debts, one of which is barred by the statute ; a general payment is held, *primâ facie*, to have been made on account of

Rule where one of two debts is disputed.

(*i*) *Walker v. Butler*, 6 E. & B. 506. But see *Burn v. Boulton*, 2 C. B. 476. [See *Pond v. Williams*, 1 Gray, 630. But in *Ayer v. Hawkins*, 19 Vt. 26, it was held that, if a debtor, owing several demands to his creditor, make a general payment, and neglect to direct its application, the right of designation belongs to the creditor ; yet he must make an application, to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held that the creditor might apply it upon which note he pleased, that he might indorse it, if he so chose, upon the largest note, although it was subsequent, in date, to the others, and that the

effect would be to take the note, upon which the application was made, out of the statute of limitations ; but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute. It is not essential that the debtor should have recollected the giving of the notes, at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it. *Ayer v. Hawkins*, *supra*.]

(*k*) *Bevan v. Geething*, 3 Q. B. 740 ; *Waters v. Tomkins*, 2 Cr., M. & R. 723.

(*l*) *Baildon v. Walton* (in Cam. Scac.), 1 Exch. 617, 633 ; [*Bellzhoover v. Yewell*, 11 Gill & J. 212.]

(*m*) *Burn v. Boulton*, 2 C. B. 476.

the debt not barred. (*n*) And where, in an action on a promissory note bearing interest, proof was given that the defendant, on being sent to by the plaintiff for money, paid 1*l*. and said: "This puts us straight for last year's interest, all but 18*s*.; some day next week I will bring that up:" this was held to be sufficient to take the case out of the statute, there being no evidence that there was any other debt due from the defendant to the plaintiff. (*o*)

So it is held, that part payment of a debt will not take the case out of the statute, unless the payment be made under circumstances, which will warrant a jury in inferring therefrom a promise to pay the residue. (*o*¹) Accordingly, where the facts showed that, at the time the defendant made the payment, he clearly intended to pay the *whole* debt, in full; it was held, that this did not take the case out of the statute. (*p*) And so where a party, on being applied to for payment of a debt, paid a sovereign, but said that, although he owed the money, he would not pay it; it was held to be a question for the jury, whether he intended thereby to refuse payment or merely spoke in jest. (*q*)

Subject to these rules, however, even a payment of interest, *quâ* interest, (*r*) where the debt consists or is composed of principal and interest, will take the case out of the statute; (*s*) although such payment be made by an agent. (*t*)

(*n*) Per Wood V. C. Nash *v.* Hodgson, 25 L. J. C. 186.

(*o*) Evans *v.* Davies, 4 A. & E. 840.

(*o*¹) [Jones *v.* Jones, 21 N. H. 219; White *v.* Jordan, 27 Maine, 370; State Bank *v.* Woody, 5 Eng. 638; Arnold *v.* Downing, 11 Barb. 554; Smith *v.* Simms, 9 Geo. 418; Steel *v.* Matthews, 7 Yerger, 313; Sigourney *v.* Drury, 14 Pick. 387; Whipple *v.* Stevens, 22 N. H. 226.]

(*p*) Foster *v.* Dawber, 6 Exch. 839, 853; 20 L. J. Exch. 385; [Smith *v.* Eastman, 3 Cush. 355. Where the maker of a note authorized an agent to offer for the note a less sum than the amount of it, such an offer not accepted, was held not to revive the debt against a plea of the statute of limitations. Atwood *v.* Coburn, 4 N. H. 315. Where a debtor, to whom application for payment was made, said it was impossible for him to pay; but offered to mortgage certain real estate to pay the debt, and to pay the interest every ninety

days, which offer the creditor did not accept; this was held not to take the case out of the statute of limitations. Exeter Bank *v.* Sullivan, 6 N. H. 124; Smith *v.* March, cited 6 N. H. 133. See Ilsley *v.* Jewett, 2 Mct. 168; Cross *v.* Conner, 14 Vt. 399.]

(*q*) Wainman *v.* Kynman, 1 Exch. 118.

(*r*) Per Parke B. Sims *v.* Brutton, 5 Exch. 802, 809.

(*s*) Worthington *v.* Grimsditch, 7 Q. B. 479; Scholey *v.* Walton, 12 M. & W. 510, 513; [Sanford *v.* Hayes, 19 Conn. 591; Fryburg *v.* Osgood, 21 Maine, 176; Walton *v.* Robinson, 5 Ired. 341. See Lane *v.* Doty, 4 Barb. 530.] But a payment on account of principal does not admit interest, unless the latter be shown to have composed part of the claim, and to be connected therewith. Collyer *v.* Willoch, 4 Bing. 313.

(*t*) Jones *v.* Hughes, 5 Exch. 104; Rew *v.* Pettit, 1 A. & E. 196.

So, payment of interest on a note payable on demand, before demand made, is sufficient to take the debt out of the statute. (*u*)

And where a *feme sole* payee of a promissory note, payable with interest, married, and her husband survived her; it was held, that payments of interest thereon to the husband, in the lifetime of the wife, within six years before action, must be considered as having been made to him in the character of agent to the wife; and that such payments were an answer to the statute. (*x*)

So, payment of interest on a promissory note, to an administrator, who had omitted to take out administration in the diocese in which the note was *bonum notabilium*, was held to be sufficient to take the case out of the statute; because, in the mind of the party paying, such a payment must have been a direct admission of the debt. (*y*)

And it may be stated, generally, that any facts which would have been sufficient to support a plea of payment, if an action had been brought for the interest, will constitute a payment of interest, to take the case out of the statute. (*z*)

So, if parties agree that goods shall be supplied in part payment of a debt, and goods are supplied and received accordingly; this will amount to a part payment, so as to take the debt out of the statute. (*a*)

Payment in goods.

So, where there are accounts with items on both sides, the going through them and striking a balance, converts the set-off into a payment, so as to take the case out of the statute. (*b*)

Balancing accounts.

So, if a sum be allowed the debtor in account as a part payment, and he pay the balance of such account, this shall be deemed a sufficient part payment within the statute. (*c*)

So, payment by the debtor to a third person, of money owing to the creditor, may, by agreement between the parties, be made a payment which will bar the statute. (*d*)

Payment to third party.

And where a bill of exchange has once been delivered in pay-

(*u*) *Bradfield v. Tupper*, 7 Exch. 27; 21 L. J. Exch. 6.

(*x*) *Hart v. Stephens*, 6 Q. B. 937.

(*y*) *Clark v. Hooper*, 10 Bing. 480, 481.

(*z*) See *Amos v. Smith*, 1 H. & C. 238; *Maber v. Maber*, L. Rep. 2 Ex. 153.

(*a*) *Cottam v. Partridge*, 4 M. & G. 271; *Hooper v. Stephens*, 4 A. & E. 71; *Hart v. Nash*, 2 Cr., M. & R. 337; and see *Blair v. Ormond*, 17 Q. B. 423, 435; *Bodger v. Arch*, 10 Exch. 333; [*Sibley v.*

Lumbert, 30 Maine, 253. So, where it was agreed that goods should be supplied in payment, in consideration of further indulgence. *Randon v. Tobey*, 11 How. (U. S.) 493.]

(*b*) Per Cur. *Worthington v. Grimsditch*, 7 Q. B. 479, 484; per Alderson B. *Ashby v. James*, 11 M. & W. 542, 543.

(*c*) *Chippendale v. Thurston*, 4 C. & P. 98.

(*d*) Per Cur. *Worthington v. Grimsditch*, 7 Q. B. 479, 484.

ment on account of a debt, so as to raise an implication of a promise to pay the balance; this will take the debt out of the statute, as from the time of such delivery, whatever afterwards takes place as to the bill. (e)

Effect of giving a bill of exchange in part payment.

So a verbal acknowledgment by the debtor, within six years, of the part payment of a debt; or a written acknowledgment of such part payment, not signed by the debtor, is sufficient to take the debt out of the statute. (f)

Verbal acknowledgment of part payment sufficient.

Again: before the passing of the 19 & 20 Vict. c. 97, it was held, that a part payment by *one of several joint debtors* or contractors, either of the principal or of interest due on the original debt, revived the remedy against the others, (f¹) although they were sureties only, and al-

Part payment by one of several joint contractors.

(e) *Turney v. Dodwell*, 3 E. & B. 136, 142; and see *Irving v. Veitch*, 3 M. & W. 90; *Gowan v. Forster*, 3 B. & Ad. 507; [*Isley v. Jewett*, 2 Met. 168; *Sigourney v. Wetherell*, 6 Met. 553.]

(f) *Cleave v. Jones* (in Cam. Scac.), 6 Exch. 573; 20 L. J. Exch. 238; overruling *Willis v. Newham*, 3 Y. & J. 518; and see *Maghee v. O'Neill*, 7 M. & W. 531; *Bayley v. Ashton*, 12 A. & E. 493; *Eastwood v. Saville*, 9 M. & W. 615; *Bradley v. James*, 13 C. B. 822. [In *Williams v. Gridley*, 9 Met. 482, it was held, that an oral admission by a defendant, that he had made a payment on the demand in suit, within six years next before the suit was commenced, is competent evidence to take the case out of the statute of limitations. Rev. Stat. Mass. c. 120, § 17; Gen. Sts. c. 155, s. 17. In the above case the English authorities were cited and considered. Such payment may be proved by any other competent parol proof. *Sibley v. Lumbert*, 30 Maine, 253.]

(f¹) [Such was the law of Maine before the Revised Statutes. *Greenleaf v. Quincy*, 3 Fairf. 14; *Pike v. Warren*, 15 Maine, 390; *Patch v. King*, 29 Maine, 454; *Colburn v. Averill*, 30 Maine, 310. And such is generally the rule when there is no statute to vary it. *Joslyn v. Smith*, 13 Vt. 352; *Real Estate Bank v. Hartfield*, 5 Pike, 551; *Turner v. Ross*, 1 Rhode Island, 88; *Ellicott v. Nichols*, 7 Gill, 85. In Massachusetts it

is enacted, that such payment by one of several joint contractors shall not take the case out of the statute as to any other of the contractors. Rev. Stat. c. 120, § 18; Gen. Sts. c. 155, s. 14. See *Pierce v. Tobey*, 5 Met. 168; *Balcom v. Richards*, 6 Cush. 360. Under a corresponding provision in the statutes of Maine, a payment made by one of two joint promisors, in the presence of the other, will not be evidence of a new promise made by both. *Quimby v. Putnam*, 28 Maine, 419. The above provision of the Rev. Stat. of Mass. was held to extend to contracts and payments made before those statutes were passed. *Pierce v. Tobey*, 5 Met. 168. See *Morrison v. Smith*, 22 Pick. 430. So in Maine: *Wellman v. Southard*, 30 Maine, 425. Where, upon a joint note given by a minor and an adult, the minor makes a payment within six years before action is brought on the note, and after he comes of age makes an oral promise to pay the balance, he thereby so ratifies his former payment, that it will take the note out of the statute of limitations, as to himself, but not as to the adult. *Pierce v. Tobey*, 5 Met. 168. In Arkansas, after a joint debt is barred by the statute of limitations, part payment by one of the joint debtors does not revive the debt, as against his co-debtor. *Biscoe v. Jenkins*, 5 Eng. 108; *Biscoe v. James*, 5 Eng. 163. So in New York: *Dunham v. Dodge*, 10 Barb. 566; *Shoe-*

though such payment was not made until the statute had run out. (*g*) And this rule applied, although the parties were bound severally, as well as jointly; and although the action was brought, separately, against one of them who did not make the part payment. (*h*)

So, it was held, that if there were several securities for a debt, on some of which the debtor was liable alone, whilst on one of them he was liable jointly with a third party, a general payment by him on account would revive them all. And therefore, where A. and B. gave a promissory note, as a collateral security for a sum of money advanced on mortgage to A.; it was held that a payment by A. of interest on the mortgage, took the note out of the statute as against B. (*i*) So, a payment by one of several joint debtors, within six years, was held to take the debt out of the statute; although it appeared that such payment was made by him in fraud of the others, and in expectation of immediate bankruptcy. (*k*) And it was held that, if one of two joint and several makers of a promissory note, made a part payment on account thereof, and the other maker afterwards died; such part payment took the case out of the statute, as against his administrator. (*l*)

But it was held, that a payment by the wife, without the privity of her husband, of interest on a joint and several promissory note,

maker *v.* Benedict, 1 Kernan, 176. So in New Hampshire: *Exeter Bank v. Sullivan*, 6 N. H. 124; *Whipple v. Stevens*, 22 N. H. 219. But though an action on a note would be barred, as against the principal, by the statute limitation; yet that limitation would be no bar to a suit against the principal for reimbursement, brought by the surety, who, by making payments on the note, had extended the period of limitation as against himself, and who had finally paid the whole note before the limitation, as against the surety, had attached to it. *Odell v. Dana*, 33 Maine, 182; *Peaslee v. Breed*, 10 N. H. 489; *Whipple v. Stevens*, 19 N. H. 150; *Boardman v. Paige*, 11 N. H. 431.]

(*g*) *Channell v. Ditchburn*, 5 M. & W. 494; *Wyatt v. Hodson*, 8 Bing. 309; *Rew v. Pettit*, 1 A. & E. 196. [See *Craig v. Calaway County Court*, 12 Missou. 94. In New Hampshire a payment made by one of two sureties upon a promissory note, was held not to take the case out of the statute of

limitations as to the other. *Exeter Bank v. Sullivan*, 6 N. H. 124. But where a partial payment was made upon a promissory note, by the surety, in the presence of the principal, who well knew and understood the fact, but said nothing in relation thereto, it was held that such payment afforded sufficient ground on which to found an inference of a new promise, as to the principal. *Whipple v. Stevens*, 22 N. H. 219. The case of *Quimby v. Putnam*, cited, *ante*, 1256, n. (*f*¹), which holds a contrary doctrine to the above case, is affected by a statute of Maine, to which there is no corresponding statute in New Hampshire. See *Kelly v. Sanborn*, 9 N. H. 46.]

(*h*) *Channell v. Ditchburn*, 5 M. & W. 494; *Whitcomb v. Whiting*, Doug. 652; *Burleigh v. Stott*, 8 B. & C. 36; *Pease v. Hirst*, 10 B. & C. 122; *Perham v. Raynal*, 2 Bing. 306.

(*i*) *Dowling v. Ford*, 11 M. & W. 329.

(*k*) *Goddard v. Ingram*, 3 Q. B. 839.

(*l*) *Burleigh v. Stott*, 8 B. & C. 36.

made by the wife and a third person before her marriage, did not bar the statute either as to the husband or herself. (*m*)

And it was also held, that a payment by one of several joint debtors, must have clear reference to the *joint* debt, or it would not affect the others. (*n*)

So, it was doubtful whether a payment made by one executor in his representative character, but without any express authority from his co-executors, would take a debt out of the statute so as to bind them. (*n*¹) For although in the cases of *Atkins v. Tredgold*, (*o*) and *M'Culloch v. Dawes*, (*p*) the court of king's bench expressed an opinion, that a payment by one executor as executor, would have this effect; yet Lord Tenterden is reported to have held the contrary. (*q*) And in a subsequent case, in which this question was incidentally discussed, it was said by one very learned judge, that that decision of Lord Tenterden appeared to be grounded in justice and good sense, and that it ought to be followed. (*r*)

It was, however, well settled, that in order that a payment by one executor might take a debt out of the statute as to the others, it must appear by the evidence of the party who proved the payment, that it was made by the executor in that capacity. (*s*)

And it was also settled, that where the original community of interest and liability had ceased, a part payment by one would affect himself only, (*s*¹) so that, *after* the *death* of one of two joint, or joint and several contractors, his executors could not be made liable by a part payment, after the lapse of six years, by the surviving debtor. (*t*) Nor, in such a case, was the latter affected by a payment on account by the executors. (*u*)

(*m*) *Neve v. Hollands*, 18 Q. B. 262; 21 L. J. Q. B. 289.

(*n*) Per Lord Ellenborough, *Holme v. Green*, 1 Stark. 488; *Brandram v. Whar-ton*, 1 B. & Ald. 463.

(*n*¹) [As to the power of executors and administrators to take a debt against their testators or intestates out of the statute, by acknowledgment or part payment, see *Briggs v. Wilson*, 5 De G., M. & G. (Am. ed.) 12, and note (2), and cases there cited; *Scott v. Hancock*, 13 Mass. 164; *Emerson v. Thompson*, 16 Mass. 429; *Johnson v. Beardslee*, 15 John. 3; *Peck v. Botsford*, 7 Conn. 172; *Fritz v. Thomas*, 1 Wheat. 66; *Oates v. Mitchell*, 15 Maine, 361, 362; *Foster v. Starkey*, 12 Cush.

328, 329; *Hodgdon v. White*, 11 N. H. 208; 2 Kent, 416, in note (*c*).]

(*o*) 2 B. & C. 23.

(*p*) 9 D. & R. 40.

(*q*) *Tulloch v. Dunn*, R. & M. 416.

[See, also, *Caruthers v. Mardis*, 3 Ala. 599.]

(*r*) Per Parke B. *Scholey v. Walton*, 12 M. & W. 510, 514. Lord Abinger would appear to have been of a different opinion. *Ib.*

(*s*) *Scholey v. Walton*, 12 M. & W. 510; *Way v. Bassett*, 5 Hare, 57.

(*s*¹) [As to collusion between one of the parties bound and the creditor, to throw the debt on the other party, see *Hunt v. Brigham*, 2 Pick. (2d ed.) 583, 584, note (1).]

(*t*) *Atkins v. Tredgold*, 2 B. & C. 23.

(*u*) *Slater v. Lawson*, 1 B. & Ad. 396.

But now, by the 19 & 20 Vict. c. 97, s. 14, it is enacted, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly, or jointly and severally, or executors or administrators of any contractor; no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the statute of limitations, so as to be chargeable in respect or by reason only of payment (*x*) of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

19 & 20 Vict.
c. 97, s. 14.

The operation of this section, however, is confined to payments made since the passing of the act. (*y*)

It was held in *Jackson v. Fairbank*, (*z*) that a payment within six years, of a dividend on a joint and several note, under a commission of bankruptcy against *one* of the makers, took the debt out of the statute of limitations as to the other. But this decision appears to have been doubted in *Brandram v. Wharton*, (*a*) — on the ground that the acknowledgment was made by parties, the assignees, who never could be called upon for contribution, — although the court distinguished that case from *Jackson v. Fairbank*, because there the claim was made and the dividend received upon the instrument itself; whereas in *Brandram v. Wharton*, the dividend was on a distinct debt, and the instrument was introduced only incidentally. And it is clear that, according to the doctrines on this subject established by more recent authorities, the case of *Jackson v. Fairbank* is not law. For the payment of a dividend by the assignee of a bankrupt, involves no admission that a larger sum is due, nor any promise to pay the remainder of the debt; and it would seem to be unquestionable that, unless the part payment relied upon does involve such an admission and promise, it will not take the case out of the statute. (*b*)

Payment of dividend after bankruptcy of one of several contractors.

So, it appears that by paying money into court, generally, on the common counts, or on a count on a bill of exchange, or the like; the defendant does not preclude himself

Effect of payment into court.

(*x*) See *Cockrill v. Sparkes*, 1 H. & C. 699.

(*a*) 1 B. & Ald. 463.

(*y*) *Jackson v. Woolley* (in Cam. Scac.), 8 E. & B. 784, reversing the judgment of the Q. B. in S. C. Ib. 778; and overruling *Thompson v. Waithman*, 26 L. J. C. 134.

(*b*) *Davies v. Edwards*, 7 Exch. 22, 25; 21 L. J. Exch. 4. [See *Roscoe v. Hale*, 7 Gray, 274, in which it was held that the payment of a dividend on a debt by the assignee in insolvency, is not such a partial payment as will defeat the statute.]

(*z*) 2 H. Bl. 340.

from relying on the statute, as to such part of the plaintiff's demand as is not covered by the sum so paid. (c)

4. Of renewing a Writ to save the Statute.

By the "Common Law Procedure Act," 15 & 16 Vict. c. 76, s. 11, provision is made for renewing any original or current writ of summons, at any time before six months from the date thereof; and so, from time to time, during the currency of the renewed writ; and it is enacted, that "a writ of summons so renewed shall remain in force, and be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons." (c¹)

So if a plaint be levied in due time in an *inferior* court, and be afterwards removed into the queen's bench, and the plaintiff declare there *de novo*, and the defendant plead the statute; the plaintiff may reply, and show the plaint in the inferior court, and that will be sufficient to avoid the statute. (d) And so a bill in equity, filed within time, will take the case out of the statute as against the parties to such bill, although they were not served with subpoena within the time. (e)

(c) Reid v. Dickons, 4 B. & Ad. 499; Long v. Greville, 3 B. & C. 10.

(c¹) [See Cornell v. Moulton, 3 Denio, 12; Bullock v. Dean, 12 Met. 15.]

(d) Bevin v. Chapman, 1 Sid. 228; S. C. 1 Lev. 143; Matthews v. Phillips, 1 Ld. Raym. 553; 2 Salk. 424; Brown v. Babington, 2 Ld. Raym. 881; Storey v. Atkins, Str. 719; 2 S. C. Ld. Raym. 1427; Tidd, 9th ed. 27, 28.

(e) Purcell v. Blennerhassett, 3 J. & L. 24; [Bacon v. Gardner, 23 Miss. (1 Cush.) 60. The time of the actual making of the writ, with an intention of service, is the time when an action is "commenced and sued," within the meaning of the statute of limitations of Maine (1821, c. 62), for it is the acquiescence of the plaintiff for six years that bars him, whether it be known to the defendant or not. Johnson v. Farwell, 7 Greenl. 370. See Soc. for Prop. Gospel v. Whitcomb, 2 N. H. 227. In Gardner v. Webber, 17 Pick. 407, it was held that if a writ is filled up and

dated before the expiration of the time limited by the statute of limitations for bringing the action, the action is not barred by the statute, though the writ is not served until such time has expired.

The date of the writ is presumed to be the true date of the commencement of the action until the contrary appears. *Ib.* See State Bank v. Cason, 5 Eng. 479; Bank of United States v. Lyles, 10 Gil & J. 326.

The filing of a claim in set-off by a defendant is equivalent to the commencement of an action thereon, so far as regards the statute of limitations; and the plaintiff cannot defeat the defendant's claim by discontinuing his suit after the statute has run as against the set-off. Hunt v. Spaulding, 18 Pick. 521. If the plaintiff would avoid the bar of the statute of limitations, by having seasonably sued out process which failed of service, through inevitable accident in the transportation by mail, it is incumbent on him to show that he previously ascertained the course of the

5. Of the Pleadings.

Where the debt is revived by an *absolute* acknowledgment within six years, it is sufficient to declare upon the original promise; (*f*) for in such a case the subsequent promise and the original promise agree together. (*f*¹)

When to declare on the original contract.

mail, and that a letter inclosing the precept, and properly directed, was put into the post-office sufficiently early to have reached the officer, by the ordinary route, in season for legal service. *Jewett v. Greene*, 8 Greenl. 447. See *Tuttle v. Smith*, 10 Wend. 386; *Soulden v. Van Rensselaer*, 3 Wend. 472; *Davis v. West*, 5 Wend. 63; *Schermerhorn v. Schermerhorn*, 5 Wend. 513; *Buskin v. Wilson*, 6 Cowen, 741; *Day v. Lamb*, 7 Vt. 426; *Burdick v. Green*, 18 John. 14; *Gates v. Bushnell*, 9 Conn. 530. It is provided by the Rev. Stat. of Mass. c. 120, § 11, Gen. Sts. c. 155, s. 11, that, if in any action duly commenced within the time limited and allowed therefor, the writ shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein. Under this act the following case arose: On the 31st of August, 1844, A. sued out a writ against D., on a note dated September 15, 1838, payable on demand, and described D. in the writ, as of T., in the county of B., where he formerly resided, though he had removed to M., in the county of P., about two years before, without A.'s knowledge. The writ was delivered to an officer in the county of B., near the last day of service, who made return thereon that he could not find D. in his precinct; on the 31st of December, 1844, A. sued out another writ against D.,

on the same note, and caused it to be served and entered in court. It was held that the first action was duly commenced, and that it failed of a sufficient service by an unavoidable accident; and, therefore, that the second action was saved from the operation of the statute of limitations within the meaning of the above provision. *Bullock v. Dean*, 12 Met. 15. The Vermont statute (Rev. St. c. 307, § 16), which provides that when an action commenced in time shall be abated, or be "otherwise defeated or avoided" "for any matter of form," a new action may be commenced within one year thereafter, does not extend to a case where the first suit was terminated by a nonsuit, occasioned by the inability of the plaintiff, through poverty, to comply seasonably with an order, made by the court, that the plaintiff furnish additional security, by way of recognizance, for the defendant's costs. *Hayes v. Stewart*, 23 Vt. 622. The statutes and laws of many of the states provide against the operation of the statute, on claims, where actions have been commenced and failed, for causes not the result of a decision on the merits or of the negligence of the party in not seasonably pursuing his claim. See *Cheney v. Archer*, *Riley*, 195; *Allen v. Rountree*, 1 Speers, 80; *Patton v. Magrath*, 1 McMullan, 212; *Ivins v. Schooley*, 3 Harr. 269; *Skillington v. Allison*, 2 Hawks, 347; *Chapman v. Magrant*, 2 Speers, 481; *Martin v. Archer*, 3 Hill (S. Car.), 271.]

(*f*) *Leaper v. Tatton*, 16 East, 420; *Upton v. Else*, 12 Moore, 303.

(*f*¹) [Where a debt is barred by the statute of limitations, and a new promise revives the right of action, the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only restores the remedy. *Oliver v. Gray*, 1 H. & Gill, 204; *Angell*

So it would appear, that if the promise were simply to pay on demand, the declaration might be framed on the original contract,

on Lim. § 288; *Guy v. Tams*, 6 Gill, 82. In *Betton v. Cutts*, 11 N. H. 170, 179, Parker C. J. said: "If the action was brought upon the new promise, there would be nothing to be taken out of the statute, for the new promise is never within it. And this shows that the action should be founded on the original contract, and that although there must be a new promise, or an acknowledgment from which a promise may fairly be inferred, the reason of this is, not that an action is founded upon the new promise as its substantive cause, but because nothing short of evidence of a debt due, and of an intention to pay it, is sufficient to take the original demand out of the statute, and remove the bar, which would otherwise defeat the action. This continues or restores the vitality of the original demand." "In fact, the new promise is in no case the cause of action, but evidence which takes the cause of action out of the operation of the statute." This practice of declaring on the original promise and relying on the new promise, in a reply to a plea of the statute of limitations, must have arisen during the prevalence of the doctrine, that the statute merely created a presumption of payment, and any evidence which rebutted that presumption was sufficient to remove the bar of the statute. If this were the true doctrine, that the acknowledgment or a new promise merely removed a presumption of payment, then of course the new promise is merely a matter of evidence, and would be sufficient to remove the presumption of payment, if made at any time before trial; and of course, also, it should not be declared upon. This doctrine of presumption of payment was the foundation of the decision in *Yea v. Fouraker*, 2 Burr. 1099, where it was held that the new promise was sufficient, though not made till after action brought. But since the later decisions upon this subject in England, this doctrine as to presumption of payment has been expressly repudiated. *Tanner v. Smart*, 6 B. & C. 602. And the case of *Yea v. Fouraker* has been expressly over-

ruled. *Bateman v. Pinder*, 3 Ad. & El. (N. S.) 574. In this last case it was held that the new promise must be before action brought, in order to prevent the operation of the statute. In *Ilsley v. Jewett*, 3 Met. 445, Shaw C. J. said: "The court are of opinion that the judgment must be considered as rendered on the old contract; that a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the statute of limitations; so as to enable the creditor to recover, notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment." The declaration being upon the original promise, of course the judgment must follow it. The doctrine which seems now to prevail in England, and is supported by great weight of authority in this country, that the new promise forms a new contract, which has for its consideration the old contract, cannot be carried to all its legitimate results so long as this practice of declaring on the old promise continues. The practice is entirely repugnant to this principle. For if the old promise be merely the consideration, then a declaration on the old promise would be absurd. *Betton v. Cutts*, 11 N. H. 178, 179. The declaration on the debt of a bankrupt or insolvent debtor, which has been revived by a new promise, may be on the original debt; *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 John. 178; *Lang v. Mackenzie*, 4 C. & P. 463; *Penn v. Bennett*, 4 Camp. 205; unless the new promise be conditional, in which case it is said that it would be judicious to declare on the new promise specially. *Ante*, 220; *Penn v. Bennett*, 4 Camp. 205. See the remark of Tilghman C. J. in *Jones v. Moore*, 5 Binn. 577, upon the report of *Heylin v. Hastings*, by Carthew. In the former case it was held by the chief justice and Yeates J. that an acknowledgment does not revive the old debt which is barred by the statute of limitations, but is evidence of a new promise,

the bringing of the action being held to be a sufficient demand. (*g*) So if the promise were, to pay if another party who was liable did not pay when applied to; such a promise would be held to become absolute, on non-payment by the other party within a reasonable time after being applied to, so as to entitle the creditor to declare on the original contract. (*h*) And the same rule holds, generally, in cases of promises to pay "when able;" the original contract of the debtor being revived, by proof of his ability to pay before action brought. (*i*)

But there are cases in which it is proper to frame the declaration, specially, upon the defendant's subsequent promise or acknowledgment; (*i*¹) as where the defendant prom- ^{When on the new promise.} ises to pay the money at a certain time after demand. (*k*) So, where an attorney promised, within six years, to pay to the plaintiff money which he had expended or lost, in consequence of the defendant's negligence, more than six years before the commencement of the suit; it was held that the declaration should be framed, upon the defendant's subsequent promise to make satisfaction to the plaintiff, and not for the original neglect, otherwise the statute would be a bar. (*l*) And where the plaintiff employed the defendant, in 1808, to lay out money for him in the purchase of an annuity; and in February 1814, he discovered that, at the time of the purchase, the security provided by the defendant was void, to the defendant's knowledge; and in January, 1820, the plaintiff sued the defendant for breach of the implied promise to provide

for which the old debt is a consideration. But see the opinion of Brackenridge J. who differed from them. *Ib.* 581-584. See, also, *Pinkerton v. Bailey*, 8 Wendell, 600, and cases cited in the preceding note. If the new promise be conditional, it cannot be given in evidence in a suit for the old debt. *Lonsdale v. Brown*, 4 Wash. 148. This last position is denied in *Betton v. Cutts*, 11 N. H. 170. See Angell on Limitations (2d ed.), 249 *et seq.* In Georgia, the new promise must be declared on in the words in which it was made, or according to its legal effect; setting out, also, the original debt as the inducement to the promise, such debt being the consideration which supports the promise. *Martin v. Broach*, 6 Geo. 21; *Beard v. Simmons*, 9 Geo. 4.]

(*g*) See *Waters v. Earl of Thanet*, 2 Q. B. 757, 769.

(*h*) *Humphreys v. Jones*, 14 M. & W. 1.

(*i*) *Humphreys v. Jones*, 14 M. & W. 1; and see per Cur. *Earle v. Oliver*, 2 Exch. 71, 90; *Higgins v. Hopkins*, 3 Exch. 163, 167; *Hart v. Prendergast*, 14 M. & W. 743, 745; *Irving v. Veitch*, 3 M. & W. 90, 107, 111; *Stone v. Rogers*, 2 M. & W. 443; [*Seedstone v. Cutts*, 11 N. H. 170.]

(*i*¹) [See *Shaw v. Newell*, 1 R. I. 488; *Brown v. Joyner*, 1 Rich. 210.]

(*k*) *Waters v. Earl of Thanet*, 2 Q. B. 757.

(*l*) *Short v. M'Carthy*, 3 B. & Ald. 626; *Whitehead v. Howard*, 2 B. & B. 372.

good security; it was held that, as the action proceeded upon the contract, and not upon the fraud, the statute was a good bar. (*m*)

So if it be anticipated that the statute will be pleaded to an action at the suit of an executor, or of the trustee or assignee of a bankrupt, for a debt due to the testator bankrupt; and there be a probability of defeating the plea, by proving a subsequent promise or acknowledgment to the plaintiff in his representative character, the declaration should contain a count laying a promise to the plaintiff in that character; for, on a count alleging a cause of action in the testator, or bankrupt, a promise or acknowledgment to the executor, or to the trustee or assignee, could not be given in evidence. (*n*) And so, in an action against a husband and wife, and A., laying only a promise "by her and A. before marriage;" no acknowledgment by A., after the marriage, can be given in evidence. (*o*)

How to plead. The statute must be specially pleaded. (*p*)

(*m*) *Brown v. Howard*, 2 B. & B. 73.

(*n*) *Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210; 1 B. & C. 249, 251; per Gaselee *J. Upton v. Else*, 12 Moore, 304. [But see *Betton v. Cutts*, 11 N. H. 170; *Buswell v. Roby*, 3 N. H. 467; 8 Mass. 134. An acknowledgment of or promise to pay the debt by the personal representatives of the original debtor, deceased, will not take the case out of the statute. *Thompson v. Peter*, 12 Wheat. 565; *Peck v. Botsford*, 7 Conn. 172; *Fritz v. Thomas*, 1 Whart. 66; *Perkins v. Bennington*, 1 Harring. 209; *Gailey v. Washington*, 2 Ib. 204; *Sanders v. Robinson*, 23 Miss. (1 Cush.) 389. But see *Emerson v. Thompson*, 16 Mass. 492; *Johnson v. Beardslee*, 15 John. 3; *Oakes v. Mitchell*, 15 Maine, 360; *Northcut v. Wilkinson*, 12 B. Mon. 408. Part payment by an administrator has been held to take a debt of the intestate out of the statute. *Niemcewicz v. Bartlett*, 13 Ohio, 271. Such is the rule in Massachusetts. In some cases it has been held, that the promise by the executor or administrator, will not revive the debt so as to charge the estate, if the debt was barred in the lifetime of the testator or intestate, but that it is otherwise where the debt was not so barred. *Reigne*

v. Desportes, *Dudley* (S. C.), 118; *M'Teer v. Ferguson*, *Riley*, 159; *Pearce v. Zimmerman*, *Harper*, 305. See *Griffin v. The Justices &c.* 17 Geo. 96. Whether one administrator may charge the estate by refusing to plead the statute, although his co-administrator insists on pleading it, see *Scull v. Wallace*, 15 Serg. & R. 231. If one administrator remain neutral, the other may plead it. *Ib.* Where there were two administrators, and the general plea of the statute was entered to an action against them on a promise of their testator; it was held, that *declarations* of one of the administrators, that he had no doubt the estate was indebted to the plaintiff, but how much he could not tell, but that his co-administrator was determined to plead the statute, and he would leave the matter to her, and would have nothing to do with it, did not take the case out of the statute. *Ib.* See, also, *Bailey v. Bailey*, 14 Serg. & R. 195; *Scott v. Hancock*, 13 Mass. 164.]

(*o*) *Pittam v. Foster*, 1 B. & C. 248. And yet the declaration cannot contain a count on a promise by the husband and wife *after the coverture*. *Morris v. Norfolk*, 1 Taunt. 212.

(*p*) *Gould v. Johnson*, *Salk*, 278; *Dra-*

Formerly there were two modes of pleading the statute: one, that the defendant "did not within six years next before the commencement of this suit *undertake or promise*," in manner and form, &c.; the other, that "the alleged *causes of action did not accrue* within six years before," &c. The former of these, however, did not apply in any action on a contract, whereon a cause of action did not accrue immediately upon the promise; *e. g.* upon a promise to pay money, or to do any act at a *future* period; (*q*) whereas the latter was applicable to every case. (*r*) And now, by the "Common Law Procedure Act, 1852," it is the only form in which the statute is to be pleaded. (*s*)

This plea may be pleaded with any other plea. (*s*¹)

The *replication* in general, merely takes issue on the plea. And this is the form of replication, even where the plaintiff relies on his having issued and renewed a writ of sum-
mons, under the 15 & 16 Vict. c. 76, s. 11, in order to bar the operation of the statute. (*t*)

But the *exceptions* in the statute should be specially replied. (*u*)

per *v. Glassop*, 1 Ld. Raym. 153; 2 Wms. Saund. 63, note (6). [Or be otherwise presented to the court as a defence. *Ware v. Webb*, 32 Maine, 41; *Ainslie v. New York*, 1 Barb. 268; *Sleeth v. Murphy*, 1 Morris, 321; *Petty v. Cleveland*, 2 Texas, 404; *Benoist v. Darby*, 12 Mis. 196; *Cook v. Kibbee*, 16 Vt. 434; *Brown v. Hemphill*, 9 Porter, 206; *Stewart v. Durrett*, 3 Mon. 113. In the case of *Chambers v. Chalmers*, 4 Gill & J. 420, it is held, that a defendant cannot avail himself of the statute, merely because the proceedings of the plaintiff show a case to which it might be applied.]

(*q*) 1 Wms. Saund. 33, note (2), 283, note (2); 2 Wms. Saund. 63 c, note (6); *Leaper v. Tatton*, 16 East, 421.

(*r*) Even to an action for a tort. See *Dyster v. Battye*, 3 B. & Ald. 448.

(*s*) 15 & 16 Vict. c. 76, Sched. No. 39.

(*s*¹) [A plea of the act of limitations ought not to be received after issue joined on another plea, unless some good reason be assigned why it was not sooner tendered. In the case below, it was tendered four years after the first issue. *Martin v. Anderson*, 6 Rand. 19.]

(*t*) See the cases on this point, under the 2 Will. 4, c. 39, s. 10, *Higgs v. Mortimer*, 1 Exch. 711; *Pratt v. Hawkins*, 15 M. & W. 399; *Dickenson v. Teague*, 1 Cr., M. & R. 241.

(*u*) Chit. jun. Pl. 3d ed. 475; 2 Wms. Saund. 124, 127, note (*b*); *Plummer v. Woodburne*, 4 B. & C. 625. [In reference to the evidence of a payment, it has been held that a credit entered on a note by the holder, after it is barred by the statute, is not evidence in itself to take the case out of the statute. *Concklin v. Pearson*, 1 Rich. 391; *West v. Johnson*, Geo. Dec. pt. 1, 72; *Connelly v. Pierson*, 4 Gilman, 108. There should be proof that the payment was actually made, and within the time, to make it available to avoid the operation of the statute. *M'Gahee v. Greer*, 7 Porter, 537; *West v. Johnson*, *supra*. Some cases hold that an entry of payment by the holder, on a note, at a time when it would be against his interest to make such entry, is evidence on the question whether a payment has been made to avoid the operation of the statute. *Smith v. Simms*, 9 Geo 418; *Alston v.*

11. *Set-off.*

1. A set-off means a cross claim, for which an action might be maintained by the defendant against the plaintiff.

In general. And the right of set-off is very different from a mere right to *reduce* or *defeat* the plaintiff's demand, on account of some matter connected therewith. Thus, in an action for money had and received, the defendant may show, without the aid of the statutes of set-off, that he is entitled to retain certain allowances out of the very sum demanded; this not being in the nature of a cross demand; but being a charge, which makes the sum of money received to the plaintiff's use so much less. (*x*) So, where the plaintiff contracted to do certain work for the defendant, and to find the materials for it for a fixed sum, and the defendant afterwards supplied a portion of the materials, which the plaintiff accepted and used up in the work; it was held, in an action by the plaintiff for work done, that the defendant was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set-off. (*y*) So, if it be agreed between a master and servant, that the latter shall pay out of his wages for all goods lost by his negligence; the value of goods thus lost may, in an action for wages, be deducted therefrom by virtue of the agreement, without any plea of set-off. (*z*) So, in an action to recover money for dyeing goods, it was held that the defendant might, at common law, prove as a defence, that there was a custom in the trade, that the amount of damage done to goods whilst being dyed, might be deducted from the price of the dyeing. (*a*) So, where mutual debts are contracted in a foreign country, and by the law of that country the defendant would be entitled, in an action against him, to set off his debt against the plaintiff's, it appears that, — irrespective of the English law of set-off, — this may be pleaded as a defence to an action brought by the plaintiff in this country, to recover the debt in question. (*b*) And so, although a general set-off

State Bank, 4 Eng. 453; Roseboom v. Billington, 17 John. 182.]

(*x*) Per Lord Mansfield, Dale v. Sollett, 4 Burr. 2133, 2134.

(*y*) Newton v. Foster, 12 M. & W. 772.

It is necessary to plead a set-off, although the plaintiff has given credit in account, for goods sold by the defendant to the plaintiff, such account not being final or

settled, and no balance being struck. Fothergill v. Jones, 1 C. & P. 133.

(*z*) Le Loir v. Bristow, 4 Camp. 134; and see Cleworth v. Pickford, 7 M. & W. 314.

(*a*) Bamford v. Harris, 1 Stark. 343.

(*b*) Macfarlane v. Norris, 2 B. & S. 782; 31 L. J. Q. B. 245.

cannot be pleaded in *replevin*, (*b*¹) still, where a tenant has been compelled by a superior landlord, or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground-rent, or other like charges; the courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be, in fact, payments of the rent itself, or of part of it, (*c*) and to be properly admissible in evidence, under the plea *riens in arriere*. (*d*)

Nor is it compulsory on the defendant to avail himself of his right of set-off; but he may, if he pleases, satisfy the plaintiff the whole of his debt, and then resort to a cross-action to recover the money due from him. (*e*) And if the set-off exceed the plaintiff's demand, an action will afterwards lie for the surplus. (*f*)

But the defence of set-off, properly so called, does not exist at common law. It is founded on the statute 2 Geo. 2, c. 22, s. 13, — which was made perpetual by the statute 8 Geo. 2, c. 24, s. 4, — and by which it is enacted, that, “where there are *mutual debts* between the plaintiff and the defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or *pleaded in bar*, as the nature of the case shall require, so as at the time of pleading

(*b*¹) [Irving *v.* Sparks, 5 Halst. 29. The rule, that a set-off is not admissible in *replevin*, is not applicable to the case of a feigned issue, to determine whether any rent is due by a tenant to his landlord. Gray *v.* Wilson, 4 Watts, 39.]

(*c*) Per Cur. Graham *v.* Allsopp, 3 Exch. 186, 198; Sapsford *v.* Fletcher, 4 T. R. 511, 512; Taylor *v.* Zamira, 6 Taunt. 624; Andrew *v.* Hancock, 1 B. & B. 37; Spragg *v.* Hammond, 2 B. & B. 59; Laycock *v.* Tuffnell, 2 Chit. 531 a.

(*d*) Jones *v.* Morris, 3 Exch. 742.

(*e*) Laing *v.* Chatham, 1 Camp. 252; [Minor *v.* Walter, 17 Mass. 237; De Sylva *v.* Henry, 8 Porter, 132; Himes *v.* Barnitz, 8 Watts, 39.] A plaintiff who arrests for the whole of his side of an account, without giving credit for an acknowledged or clear debt due to the defendant, may be treated as having acted

maliciously, and without probable cause. See Austin *v.* Debram, 3 B. & C. 139.

(*f*) Hennell *v.* Fairlam, 3 Esp. 104. [Upon the case stated in the text, where the set-off exceeds the plaintiff's demand, the defendant, according to the usual practice in the United States, would have judgment against the plaintiff for the surplus due on his set-off. Good *v.* Good, 9 Watts, 567; Cowsar *v.* Wade, 2 Brevard, 291. The plaintiff would not be allowed to discontinue his action to avoid this. Riley *v.* Carter, 3 Humph. 230. But the defendant may generally withdraw his set-off, although the effect of the withdrawal might be to leave the plaintiff's claim liable to be defeated by the statute of limitations. Cary *v.* Bancroft, 14 Pick. 218; Theobald *v.* Colby, 35 Maine, 179; Muirhead *v.* Kirkpatrick, 5 Watts & S. 506.]

the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence; *notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence under such issue."

And the 5th section of the 8 Geo. 2, c. 24, provides, that by virtue of the preceding clause, mutual debts may be set off against each other, as before mentioned, although such debts be of a *different nature*; but that in cases where either of the debts accrues by reason of a *penalty* contained in any bond or specialty, the same shall be pleaded, and the plea shall state how much is justly due on either side, and the plaintiff shall have judgment for the just balance only. (*g*)

To what cases they apply.

2. Let us now see to what cases the provisions of these statutes apply.

1st. And, first, the statutes do not apply, except in the case of mutual *debts*: that is, to claims in the nature of a debt, (*g*¹) which are either reduced or reducible to a *certain amount*, and which would be recoverable in an action *ex contractu*; and, therefore, there cannot be a set-off against any claim, in respect of which the plaintiff seeks to recover *unliquidated damages*, — *i. e.* damages which cannot be ascertained by the parties without the intervention of a jury. (*h*)

(*g*) See *Attwool v. Attwool*, 2 E. & B. 23. •

(*g*¹) [In an action on a promissory note, indorsed to a bank, the defendant cannot set off against the claim of the bank, any stock he may have therein. *Wittington v. The Farmers' Bank &c.* 5 Harr. & J. 489. In Massachusetts, promissory notes given by the plaintiff to the defendant, being evidence of money paid, may be set off. *Sargeant v. Southgate*, 5 Pick. 312; *Peabody v. Peters*, Ib. 1 (2d ed.), 4, note (1). And in an action by the indorsee against the maker of a note indorsed after it became due, the defendant may give in evidence a note given to him by the promisee before the transfer by way of a set-off, notwithstanding he has commenced an action thereon, and the action be pending. Ib.; *Braynard v. Fisher*, 6 Ib. 355. See *Barney v. Norton*, 2 Fairf. 352; *Collins v. Allen*, 12

Wend. 356; *Shirley v. Todd*, 9 Greenl. 83. If the maker of a note payable to A. B. or bearer, is sued by one as bearer, the defendant will not be allowed to plead any demand in set-off, except such as he may have against the plaintiff in the action. *Parker v. Kendall*, 3 Vt. 540. In a suit in New Hampshire on a negotiable promissory note in the name of the indorsee, to whom it has been *bonâ fide* and for a valuable consideration transferred, a demand in favor of the maker against the indorser is not admissible as a set-off, although the note may have been a discredited note when the indorsee took it. *Chandler v. Drew*, 6 N. H. 469. See *Tillon v. Britton*, 4 Halst. 120. A similar decision has been made in Connecticut. *Stedman v. Gilson*, 10 Conn. 55. See *Robinson v. Lyman*, 10 Conn. 30.]

(*h*) Per *Tindal C. J.* *Morley v. Inglis*,

Accordingly it has been held, that a set-off is not available in an action for not accepting a bill of exchange for the price of goods, if the suit were commenced before the expiration of the period during which the bill was to run. (*i*) Nor can a set-off be pleaded to an action against an agent for not accounting; (*k*) nor to an action on a bond conditioned for replacing stock; (*l*) or conditioned to indemnify generally, and not against the payment of a liquidated demand; (*m*) nor to an action for a partial loss under a policy of insurance, (*n*) even although the loss has been adjusted. (*o*)

Nor can a set-off be pleaded to an action for the breach of a covenant for quiet enjoyment. (*p*)

So it has been held, that a set-off cannot be pleaded to a special count, for not indemnifying the plaintiff for having been forced and obliged, as the accommodation acceptor of a bill, to pay such bill, with interest and expenses; because, if the contract declared upon was such as might entitle the plaintiff to recover special damages, the statutes of set-off did not apply, even although no special damage was laid; and the jury might possibly give damages, in such a case, for the manner in which the plaintiff had been forced and compelled to pay the bill. (*q*)

But, in the case just cited, it was said that the defendant, might, perhaps, have pleaded a set-off to that part of the count, which charged the defendant with the amount of the acceptance paid by the plaintiff. And in a later case — where the plaintiff declared on an agreement by the defendant to indemnify the plaintiff against the costs which he might be obliged to pay in a certain suit; and the declaration alleged that the plaintiff was compelled to pay the sum of 131*l.* 18*s.* 10*d.* for costs in the said suit; and assigned as a breach, that the defendant had not indemnified the plaintiff, nor paid the said sum, — it was held, that a plea of set-off, pleaded to so much of the said breach as related to the non-payment of the said sum of 131*l.* 18*s.* 10*d.*, was good. (*r*)

5 Scott, 314, 332; *Grant v. Royal Exchange Assurance Co.* 5 M. & S. 442; [*Webster v. Lee*, 6 Rand. 519.]

(*i*) *Hutchinson v. Reed*, 3 Camp. 329.

(*k*) *Birch v. Depeyster*, 4 Camp. 385.

(*l*) *Gillingham v. Waskett*, M'C. 198.

(*m*) *Attwool v. Attwool*, 2 E. & B. 23.

(*n*) *Castelli v. Boddington*, 1 E. & B.

66; *Boddington v. Castelli*, Ib. 879.

(*o*) *Luckie v. Bushby*, 13 C. B. 864.

(*p*) *Warn v. Bickford*, 7 Price, 550; *Weigall v. Waters*, 6 T. R. 488.

(*q*) *Hardcastle v. Netherwood*, 5 B. & Ald. 93; and see *Crampton v. Walker*, 3 E. & E. 321; 30 L. J. Q. B. 19.

(*r*) *Brown v. Tibbits*, 11 C. B. N. S.

855.

And so, if the moneys claimed under a special count for damages, may also be recovered under one of the common counts in the declaration, and the defendant plead a set-off as to the latter count, he shall have the benefit of his set-off; and the plaintiff shall not be permitted to exclude it by having declared specially. (s)

On the other hand, however, there are some cases in which a set-off may be excluded by declaring specially for damages. Thus, if a bill of exchange be delivered by A. to B. for a special purpose, *e. g.* to deliver it to a creditor of A. in payment of a debt; but B., instead of doing this, receives and retains the amount of the bill; A. may avoid a set-off for money due from him to B., by suing the latter, specially, for the breach of his promise to deliver the bill to the creditor; whereas, if A. sue merely for money had and received, B.'s set-off will be available. (t) And so, a set-off against the holder even of an *overdue* bill may be defeated, by his indorsing it to a third person for value without notice of the set-off. (u)

So, we have seen that the 8 Geo. 2, c. 24, s. 5, enacts, "that in cases where either of the debts accrues by reason of a penalty contained in any bond or specialty, the same shall be pleaded, and the plea shall state how much is justly due on either side; and the plaintiff shall have judgment for the just balance only." And under this clause it has been decided, that a set-off may be pleaded to an action for one of a series of sums payable on a bond,—as where the condition is for payment of an annuity or other growing sum; (v) and that this may be done, whether the set-off existed at the time such sum became payable or not, provided only it was in existence at the time of the commencement of the action. (x)

2d. Secondly, the sum claimed to be set off by the defendant must be a debt; (y) and hence it appears, that unliquidated losses on a policy of insurance cannot be made the subject of a set-off. (z)

So it is held, that a mere liability under a guaranty cannot form

(s) *Birch v. Depeyster*, 4 Camp. 385.

(t) *Thorpe v. Thorpe*, 3 B. & Ad. 580.

(u) *Burrough v. Moss*, 10 B. & C. 558.

(v) *Collins v. Collins*, 2 Burr. 820, 826;

and see *Hodgkinson v. Wyatt*, 1 D. & L. 668.

(x) *Lee v. Lester*, 7 C. B. 1008, 1017; 18 L. J. C. P. 312, 314.

(y) *Sed, uere*; whether to an action for the price of goods supplied under a con-

tract, it is not a good equitable set-off, that the defendant has sustained damages, by reason of the plaintiff's breach of the same contract. *Makeham v. Crow*, 15 C. B. N. S. 847.

(z) *Thomson v. Redman*, 11 M. & W. 487; *Grant v. Royal Exchange Assurance Company*, 5 M. & S. 439; *Cumming v. Forester*, 1 M. & S. 494. But see *Roster v. Eason*, 2 M. & S. 112.

the subject of a set-off. Thus, in an action of *assumpsit*, the defendant relied on a set-off founded on a *guaranty* given to him by the plaintiff, for goods to be sold by the defendant to one Kirkpatrick. Kirkpatrick, having obtained the goods, became bankrupt. The plaintiff and the defendant afterwards settled an account, in which 1,000*l.*, — which the defendant admitted should be taken as the amount payable under the guaranty, — was put to the credit side of the defendant's account; and a balance was struck on the account so stated: and Lord Ellenborough held, that there was no foundation for the set-off, there not being an absolute debt by the plaintiff to the defendant, but an engagement for the deficiency of Kirkpatrick only; and it being impossible to say to what extent the plaintiff was liable, until it was ascertained how much was paid by Kirkpatrick's estate. And, with respect to the settlement of the account, his lordship said, that the 1,000*l.* "was only stated as the amount of the guaranty, and the possible amount in the account; but it was still liable to be altered by the dividend made by Kirkpatrick, in diminution of the debt due by him to the defendant. To make the sum admissible as a set-off, the sum must be settled in moneys numbered, which was not the case here; and it was therefore inadmissible." (a)

But where a party has actually paid money for another, under a guaranty, the money so paid may be set off in an action by the latter, as money paid to his use. (b)

Where, upon a contract for the sale of goods, it is expressly agreed that the price shall be paid in *ready money* at the time of the delivery of the goods, the vendor has a *lien* on the goods for the price, although he is indebted to the purchaser in a larger amount; and, even upon the bankruptcy of the vendor, his assignees cannot be sued for detaining the goods sold, unless the price be actually tendered. (c) But although the goods were to be paid for in ready money when delivered, yet if the vendor part with them, he loses his *lien*, (c¹) and then, in suing for the price, the defendant's set-off will be let in. This was decided in *Eland v. Karr*, (d)

(a) *Crawford v. Stirling*, 4 Esp. 207; recognized and acted on in *Morley v. Inglish*, 5 Scott, 314, 333. But a party might be held to bail on a guaranty, to a certain amount, for goods to be sold. *Cope v. Joseph*, 9 Price, 155.

(b) *Hutchinson v. Sydney*, 10 Exch. 438.

As to a set-off in bankruptcy, under a guaranty, see *Re Willis*, 4 Exch. 530; 19 L. J. Exch. 30.

(c) *Clarke v. Fell*, 4 B. & Ad. 404.

(c¹) [See *M'Farland v. Wheeler*, 26 Wend. 467.]

(d) 1 East, 375; recognized in *Mayer v.*

where, to a plea of set-off, the plaintiff replied that the defendant agreed to pay ready money; and upon general demurrer, the replication was held to be bad. It was urged by the plaintiff's counsel, that the set-off was unjust; because the defendant, having obtained the goods at a lower or ready-money price, thereby attempted to avail himself of a mode of payment adapted to a credit price. But the court answered, that in estimating the plaintiff's damages, the jury might take into consideration the loss he had sustained by not being paid in ready money. (*d*¹) So in *Cornforth v. Rivett*, (*e*) it was held, that upon such a contract the defendant might even set off the plaintiff's acceptance, of which the plaintiff had become the holder after the sale and before the delivery of the goods; Lord Ellenborough observing, that supposing it could have been shown that the bill was really the bill of another person, put into the defendant's hands to set off against his debt, that might have presented a different question. (*e*¹)

And so it appears, that the price of goods bargained and sold, but not delivered in consequence of the plaintiff's refusal to pay the price thereof, may be set off, notwithstanding the defendant has a lien on the goods for such price. (*f*)

So, although in an action by a servant against his master for wages, the latter cannot set off the value of goods lost by the servant's negligence; yet we have seen, that if it be proved to have

Nias, 1 Bing. 311. See per Patteson J. *Groom v. West*, 8 A. & E. 758, 770; and per Lord Ellenborough, *Fair v. M'Iver*, 16 East, 130.

(*d*¹) [It was held by the supreme court of Pennsylvania, in the case of *Shaw v. Badger*, 12 Serg. & R. 275, that in an action brought to recover the price of cattle, the defendant may give in evidence, by way of set-off, or equitable defence, that he had sustained damage by reason of the plaintiff not having delivered to him certain sheep purchased by him at the same time, of the plaintiff, in an entire contract. And although the act of that state is more comprehensive than the British statute of set-off, it was observed by Duncan J. who delivered the opinion of the court, that in a case like the one before them, the courts of Westminster, at the present day, would allow the set-off; and referred to *Fisher v.*

Samuda, 1 Camp. 190, and *Farnsworth v. Garrow*, *Ib.* 83.]

(*e*) 2 M. & S. 510; recognized in *Clarke v. Fell*, 4 B. & Ad. 404.

(*e*¹) [Where a promissory note is assigned merely for the purpose of enabling the taker to set it off against a claim by the assignees of a failing debtor, it seems that the former will not be entitled to make the set-off. *Richter v. Selin*, 8 Serg. & R. 425.]

(*f*) *Dunmore v. Taylor*, Peake, 41. [In Pennsylvania, under its statute, which is more comprehensive than the English act, the defendant may, in an action for the price of goods sold, give in evidence by way of set-off, a warranty of the articles and breach thereof; and that, without returning them, or giving the vendor notice to take them away. *Steigleman v. Jeffries*, 1 Serg. & R. 477. See *ante*, 652, 653, and n. (*h*).]

been part of the original agreement between them, that the servant should pay, *out of his wages*, for all his master's goods lost through his negligence, the value of the goods so lost may be deducted, under the general issue, from the amount claimed for wages. (*g*)

And so, money due on a judgment may be set off, (*g*¹) though a writ of error be pending thereon. (*h*)

And it is no answer to a set-off, that the defendant has sued or obtained a verdict for the amount. (*i*)

So, it has been decided that an express agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds, without setting off a debt then due to him from his principal, is not binding upon the broker, so as to deprive him of his

(*g*) *Ie Loir v. Bristow*, 4 Camp. 134.

(*g*¹) [See *Metzgar v. Metzgar*, 1 Rawle, 227; *Turner v. Satterlee*, 7 Cowen, 481. A party cannot set off a judgment, unless he be the beneficial, as well as the nominal owner of it. *Satterlee v. Ten Eyck*, 7 Cowen, 480. A judgment purchased by a party with a view to set it off, and with condition that, if he failed to obtain the set-off on motion, the assignment shall be void, and accompanied with a stipulation that the assignee shall be indemnified against the costs of the motion, cannot be set off. To warrant setting off, he must purchase absolutely. *Gilman v. Van Slyck*, 7 Cowen, 469. A judgment in favor of A. against B. individually, and a judgment in favor of a copartnership, consisting of B. & C. against A., are not mutual debts; and one cannot be set off against the other. *Francis v. Rand*, 7 Conn. 221. Nor, in such case, will an assignment of one of the partners' interest in the judgment to the other, enable the latter to set off that judgment against the separate judgment, unless the separate creditor had notice of such assignment, at the time of the commencement of the suit in which the set-off is sought. *Ib.* One judgment may be set off against another, where both are in the same right, though in different courts. *Best v. Lawson*, 1 Miles, 10. See *Holmes v. Robinson*, 4 Ham. 91. In assumpsit by A. against B. for goods sold and delivered,

the defendant may set off a judgment obtained by C. to his use against A., after the action brought by A. against B. *Bell v. Cowgill*, 1 Ashm. 8. The equitable right of setting off one judgment against another, is permitted only where it will infringe upon no other right of equal grade; consequently it will not be permitted against an assignee for value. *Ramsay's Appeal*, 2 Watts, 228. See *Holmes v. Robinson*, 4 Ham. 91. There were two actions in favor of the same plaintiff, against the same defendant, in one of which judgment was rendered for the plaintiff, and in the other for the defendant, at the same term, and the judgments were by the order of the court set off one against the other without any objection. At a subsequent term, the plaintiff's attorney moved the court to rescind the order of set-off, on the ground that his lien upon the costs was affected by it; but the court overruled the order, on the ground that it was made too late. *Holt v. Quimby*, 6 N. H. 79.]

(*h*) *Reynolds v. Beerling*, 3 T. R. 118, note; *sed vide* *Curling v. Innes*, 2 H. Bl. 372.

(*i*) *Bull. N. P.* 180; *Baskerville v. Brown*, 2 Burr. 1229; *Evans v. Prosser*, 3 T. R. 186; [*Stroh v. Urich*, 1 Watts & S. 57. In some states it is held that a defendant cannot set off a claim, on which a suit is then pending in his favor. *Lock v. Miller*, 2 Stew. & P. 13.]

legal right of lien or set-off, even although the plaintiff declare specially upon such agreement. (*k*)

And although a creditor borrow money from his debtor, and expressly promise to pay it without taking notice of the debt then due to him, or affecting to set the one demand against the other, this will not prevent him from availing himself of such set-off. (*l*)

But the defendant cannot set off a debt due to him upon a judgment, whereon he has charged the plaintiff in execution; and the plaintiff may reply such taking in execution. (*m*)

So where, to an action brought to recover the price and value of work, agreed to be done by the plaintiff for the defendant for a certain sum, the defence, as to part, was that the defendant had done the work himself; this was held not to be the subject of a set-off. (*n*)

We shall hereafter (*o*) have occasion to point out the distinction between a sum reserved by contract, as a *penalty*, and a sum so reserved, as *liquidated damages*, to be paid to one of the contracting parties in the event of the contract being broken. But we may remark, in this place, that when such sum is reserved as a *penalty*, it cannot be set off; (*p*) although it is otherwise, where the full amount thereof is recoverable as liquidated damages. (*q*)

Thus where, by articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated that, in the event of the work not being completed in three months, the builder should forfeit and pay to his employer the sum of 5*l.* weekly, and every week; such penalty to be deducted from the amount which might remain due on the completion of the work; it was held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the amount claimed for extra work. (*r*)

(*k*) M'Gillivray v. Simson, 2 C. & P. 320; S. C. 9 D. & R. 35.

(*l*) Lechmere v. Hawkins, 2 Esp. 626; [Loudon v. Tiffany, 5 Watts & S. 367; Baker v. Brown, 10 Missou. 396.]

(*m*) Taylor v. Waters 5 M. & S. 103; overruling Peacock v. Jeffery, 1 Taunt. 426; Simpson v. Hanley, 1 M. & S. 496; per Williams J. Thompson v. Parish, 5 C. B. N. S. 685, 694.

(*n*) Turner v. Diaper, 2 M. & G. 241; 2 Scott N. R. 447.

(*o*) Post, Chapter VI.

(*p*) Nedriffe v. Hogan, 2 Burr. 1024; Bull. N. P. 180; Freeman v. Wyatt, 1 Bl. 394; Dowsland v. Thomson, 2 Bl. 910; Howlett v. Strickland, Cowp. 56; Gillett v. Mawman, 1 Taunt. 137; [Burgess v. Tucker, 5 John. 105.]

(*q*) Legge v. Harlock, 12 Q. B. 1015 Fletcher v. Dyche, 2 T. R. 32.

(*r*) Duckworth v. Alison, 1 M. & W.

But if, in such a case, any portion of the delay was occasioned by the act or default of the person claiming the penalty, this will wholly exonerate the contractor from such penalty. (*s*)

So where a clerk, under an agreement for a salary of 140*l.* a year, — determinable by three months' notice, or payment of three months' salary, — was dismissed without notice, under circumstances which did not amount to a justification of such dismissal; and his employer afterwards sued him for money had and received; it was held, that he was entitled to set off in that action the amount of the three months' salary. (*t*)

So where a statute (*u*) enacted, "that where the full purchase or consideration money" for a conveyance, "should not be truly expressed or set forth" therein, "it should be lawful for the purchaser to recover back from the seller, so much of the purchase or consideration money as should not be expressed and set forth, in an action for money had and received for the use of the party suing for the same;" it was held, that such a sum of money might be made the subject of a plea of set-off. (*v*)

But it would seem that a *penalty* recoverable by statute cannot be made the subject of a set-off, inasmuch as such penalty is not a debt. (*x*)

So there cannot be a set-off in respect of a debt barred by the statute of limitations, unless the claim has been revived by a written acknowledgment, or by part payment. (*y*) But, in order to defeat such set-off, it must appear that the causes of set-off did not accrue within six years next before *the commencement of the suit*. (*z*)

Nor was a defendant entitled to plead a debt from which the plaintiff had been discharged under the insolvent debtors' act, as a set-off to an action brought by the plaintiff, for a demand which had accrued since the discharge. (*a*)

But it has been held, that although an attorney cannot *recover*

(*s*) *Holme v. Guppy*, 3 M. & W. 387; *Russell v. Da Bandeira*, 13 C. B. N. S. 149; and see *Roberts v. Bury Commissioners*, L. Rep. 4 C. P. 1755; (in Cam. Scac.), 5 Ib. 310; *Jones v. St. John's College*, L. Rep. 6 Q. B. 115

(*t*) *East Anglian Railways Company v. Lythgoe*, 10 C. B. 726; 20 L. J. C. P. 84.

(*u*) 48 Geo. 3, c. 149, s. 24.

(*v*) *Gingell v. Purkins*, 4 Exch. 720.

(*x*) *Per Parke B. Ib.* 727.

(*y*) 9 Geo. 4, c. 14, s. 4.

(*z*) *Walker v. Clements*, 15 Q. B. 1046; [*Gilchrist v. Williams*, 3 A. K. Marsh. 235; *Turnbull v. Strohecker*, 4 McCord, 210; *Jacks v. Moore*, 1 Yeates, 391.]

(*a*) *Francis v. Dodsworth*, 4 C. B. 202.

his bill for business done, unless he has delivered it, signed, a month before action brought; yet he may *set off* the amount, provided he deliver the bill before the trial; and that it is immaterial, that, at the time of the trial, a month had not elapsed from such delivery. (*b*)

And so it would seem that although, where a member of a joint stock banking company is sued by the company, the right of set-off is limited by the statutes 1 & 2 Vict. c. 96, s. 4, and 5 & 6 Vict. c. 85; yet this restriction does not apply where the company is sued by one of the members thereof. (*c*)

3d. A debt cannot be set off, unless it was actually *due and in arrear* at the time of the *commencement* of the action, and at the time of plea pleaded; and, therefore, a plea which merely states that the plaintiff was indebted to the defendant "at the time the plaintiff declared," or "at the time of plea pleaded," is bad. (*d*)

And in like manner it is held, that a defendant cannot set off, by a plea to the further maintenance of the action, a debt which accrued after action brought, and before plea pleaded. (*e*)

Nor can there be a set-off in respect of money secured by a promissory note, or bill of exchange, not due when the suit was commenced; (*f*) nor in respect of any other sum, which the defendant has merely rendered himself *liable* to pay. (*g*) And where two cross actions were referred to arbitration, and in one, which was an action of trespass, the arbitrator found for the plaintiff for 40*s.* damages, with costs; whilst in the other he awarded 102*l.* to

(*b*) *Brown v. Tibbits*, 11 C. B. N. S. 855; 31 L. J. C. P. 206; *Harrison v. Turner*, 10 Q. B. 482; and see per Parke B. *Lester v. Lazarus*, 2 Cr. M. & R. 665, 669.

(*c*) *Milvain v. Mather*, 5 Exch. 55.

(*d*) *Dendy v. Powell*, 3 M. & W. 442; *Evans v. Prosser*, 3 T. R. 186; *Eland v. Karr*, 1 East, 376; and see 15 & 16 Vict. c. 76, Sched. B. No. 41; [*Carpenter v. Butterfield*, 3 John. Cas. 145; *Jefferson Co. Bank v. Chapin*, 19 John. 322; *Stewart v. United States Insurance Co.* 9 Watts, 126; *Edwards v. Temple*, 2 Harring. 322; *Carpew v. Canavan*, 4 How. (Miss.) 370; *Hardy v. Corlis*, 21 N. H. 356; *Kelly v. Garrett*, 1 Gilman, 649.]

(*e*) *Richards v. James*, 2 Exch. 471.

(*f*) *Rogerson v. Ladbroke*, 1 Bing. 93. [In the court of appeals of Maryland, it has been decided, that the defendant may set off against the plaintiff's demand, a note of the plaintiff's, accrued subsequently to the commencement of the action. *Clark v. Magruder*, 2 Harr. & J. 77. And that a debt or demand may be set off, although such debt or demand was not subsisting at the time the action was brought. *Ib.*]

(*g*) *Leman v. Gordon*, 8 C. & P. 392. [Money paid by the defendant as a surety for the plaintiff, *after action brought*, but on an obligation entered into before, cannot be set off. *Cox v. Cooper*, 3 Ala. 256.]

the plaintiff, such sum to be paid at a *future day*; it was held that the latter could not, before that day, set off that sum against the damages and taxed costs in the action of trespass. (*h*)

And it is further necessary, that the debt sought to be set off should continue due at the time of the trial. (*i*) and at the time of the trial.

4th. And although, to entitle the defendant to avail himself of this defence, the debt sought to be recovered, and that intended to be set off, need not be of the same *nature or degree*; yet it is necessary that they should be *mutual*, that is, due in the *same right*. (*k*) Debts must be mutual.

Therefore, in an action by two or more partners, the defendant cannot set off a debt due to him from one of the firm, even although the defendant, at the time the debt was contracted, did not know that that one was not dealing with him on his own account merely. (*l*) So, where A. and B. sued the defendant for work, &c., and the defendant pleaded a set-off for money received by A., before B. became a member of the firm; it was held, that the plea afforded no answer to the action, although A. had, after the commencement of the partnership, admitted the receipt of the money. (*m*) And so it has been held that, in an action on a policy effected by the plaintiff in his own name, but in which others are interested with him, the defendant cannot set off a debt due to him from the plaintiff only, although it accrued before he had notice that the others were so interested. (*n*) Joint plaintiffs.

But still if a person, with the assent of his partners, carry on business as the ostensible sole proprietor; or if, through their laches or default, he be allowed to appear as such; the defendant may, in an action by the firm, set off a debt due to him from the ostensible partner; provided the defendant was ignorant, when he contracted the debt sought to be recovered, that the plaintiff had a partner; and trusted the plaintiff as sole proprietor, before he was aware that he had such partner. (*o*)

(*h*) *Young v. Gye*, 10 Moore, 198.

(*i*) *Eyton v. Littledale*, 4 Exch. 159, 162.

(*k*) *Grant v. Royal Exchange Assurance Company*, 5 M. & S. 439. The same rule applies in equity. *Gale v. Luttrell*, 1 Y. & J. 180.

(*l*) *Gordon v. Ellis*, 2 C. B. 821. [See *Fuller v. Wright*, 18 Pick. 403; *Banks v. Pike*, 15 Maine, 268; *Ross v. Knight*, 4

N. H. 236; *Watson v. Hensell*, 7 Watts, 344; *Jones v. Gilreath*, 6 Ired. 338; *Vose v. Philbrook*, 3 Story, 335.]

(*m*) *France v. White*, 8 Scott, 257.

(*n*) Per Lord Ellenborough C. J. *Grant v. Royal Exchange Assurance Company*, 5 M. & S. 439, 442.

(*o*) *Gordon v. Ellis*, 2 C. B. 821; *Stacey v. Decy*, 2 Esp. 469, note. See *Lloyd v. Archbowl*, 2 Taunt. 324, 327; *Skinner v.*

And where an action is brought — as since the 23 & 24 Vict. c. 126, s. 19, it may be — in the names of all the persons in whom the legal right may be supposed to exist, (*p*) and a defendant therein has pleaded a set-off, such defendant may, upon the trial of the action, obtain the benefit of his set-off, by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined; or by proving that the plaintiff or plaintiffs who establish his or their right to maintain the action, is or are indebted to him. (*q*)

Again: one of several defendants cannot set off a debt due to him, alone, from the plaintiff. (*r*) But where, to assumpsit for work and labor, &c., the defendant pleaded, that the promises were made by him jointly with L., and set off a debt due from the plaintiff to the defendant and L. jointly; this was held to be a good plea. (*s*)

And a defendant may set off against a debt due from him, a debt due on a joint and several promissory note, made by the plaintiff and others. (*t*)

So, on the death of one of two or more joint creditors or debtors, the legal right or liability survives, and vests in law exclusively in or against the remaining creditor or debtor. And therefore a debt due to the defendant as

Effect of death of one or more.

Stacks, 4 B. & Ald. 437. See *Cothay v. Fennell*, 10 B. & C. 671.

(*p*) That is, in whom the right can, by law, exist. See *Bellingham v. Clark*, 1 B. & S. 332.

(*q*) 23 & 24 Vict. c. 126, s. 20.

(*r*) [See *Woods v. Carlisle*, 6 N. H. 27; *Howe v. Sheppard*, 2 Sumner, 409; *Paliver v. Green*, 6 Conn. 14; *Emerson v. Baylies*, 19 Pick. 59; *Warren v. Wells*, 1 Met. 80; *Walker v. Leighton*, 11 Mass. 140. So, in the State of Virginia, it is held, that joint and separate demands cannot be set off against each other, nor can partnership and separate demands be set off against each other. *Porter v. Neckervis*, 4 Rand. 359; *Gregg v. James*, 1 Breese, 107. In Pennsylvania it has been adjudged, that one of two defendants may set off a debt due to him by the plaintiff, unless there be some superior equity in a third person; *Steward v. Coulter*, 12 Serg. & R. 252; *Childerston v. Hammond*, 9

Serg. & R. 68; but that such a debt cannot be set off, if due to a co-defendant on whom the original writ was not served; *Henderson v. Lewis*, 9 Ib. 379; that in an action by partners, the defendant cannot set off an account for goods sold to another person, with whom the plaintiffs were alleged to be in partnership; *M'Dowell v. Tyson*, 14 Serg. & R. 300. See *Woods v. Carlisle*, 6 N. H. 27; unless there be an express agreement to that effect. See *Kinnerley v. Hossack*, 2 Taunt. 170; *Hood v. Riley*, 3 Green, 127.] Unless there be an express agreement to that effect. See *Kinnerley v. Hossack*, 2 Taunt. 170. As to a set-off in the case of a joint and several obligation, where one debtor only is sued, and the plaintiff is indebted to the other debtor; 2 Pothier by Evans, 68.

(*s*) *Stackwood v. Dunn*, 3 Q. B. 822.

(*t*) *Owen v. Wilkinson*, 5 C. B. N. S. 526.

surviving partner, may be set off against a debt due from him in his own separate character. (*u*) And so a debt due from the plaintiff as surviving partner, may be set off against a debt due from the defendant to the plaintiff in his own right. (*x*)

A defendant sued as executor or administrator cannot set off a debt due to him personally; nor can a person who is sued for his own debt set off a debt which accrued to him in his representative character. (*y*)

Set-off by
and against
executor.

So the statute does not allow the defendant to set off a debt due to him from the plaintiff's testator, against a debt which accrued to the plaintiff, in his representative capacity, after the testator's death. For this would be altering the due course of the distribution of assets, and the defendant might thus be indirectly paid before creditors of a higher degree. (*z*) Thus a debt due from a testator or intestate, cannot be set off in an action for money had and received to the use of the plaintiff as executor or administrator. (*a*)

And this doctrine holds, whether the plaintiff declare as executor, or sue, as he may do, in his private character for the debt which accrued due to him since the testator's death. (*b*) Thus where A. — being appointed by B. to receive his rents — received, after the death of B., money due to him in his lifetime; it was held that A. could not set off against the executrix of B., who brought an action for this debt in her individual capacity, a debt due to him from the testator; for the testator himself never had any cause of action against the defendant. (*c*) So, to an action by

(*u*) *Slipper v. Stidstone*, 5 T. R. 493; [*Lewis v. Culberston*, 11 Serg. & R. 48.]

(*x*) *French v. Andrade*, 6 T. R. 582; [*Holbrook v. Lackey*, 13 Met. 132.]

(*y*) *Per Willes C. J. Hutchinson v. Sturges, Willes*, 263, 264. [See *Grew v. Burditt*, 9 Pick. 265; *Snow v. Conant*, 8 Vt. 308; *Harbin v. Levi*, 6 Ala. 399; *Thomas v. Hopper*, 5 Ala. 442.]

(*z*) *Ib.* [See *Shaw v. Gookin*, 7 N. H. 16; *Fry v. Evans*, 8 Wend. 530; *Mercien v. Smith*, 2 Hill, 210; *Colby v. Colby*, 2 N. H. 419; *Woltersberger v. Bucher*, 10 Serg. & R. 10. Where the defendant paid a sum of money after the death of the intestate, upon a liability entered into by the defendant, as surety for the intestate in his lifetime, it was held that this was not a demand due from the intestate, and has

not the mutuality required for a set off. *Granger v. Granger*, 6 Ham. 41.]

(*a*) *Rees v. Watts* (in Cam. Scac.), 11 Exch. 410; affirming *Watts v. Rees*, 9 Exch. 696, overruling *Mardall v. Thelluson*, 18 Q. B. 857; and see S. C. (in Cam. Scac.), 6 E. & B. 976; *Schofield v. Corbett*, 11 Q. B. 779.

(*b*) *Shipman v. Thompson, Willes*, 103; S. C. Bull. N. P. 180; *Kilvington v. Stevenson*, and *Tegetmeyer v. Lumley*, cited *Willes*, 264, note (*a*). In *Kilvington v. Stevenson*, the action was in covenant to recover rent, part of which accrued to the testator, and part after his death; and a set-off, in respect of a debt due from the testator, was not allowed.

(*c*) *Shipman v. Thompson, Willes*, 103.

the executors of an underwriter against an insurance broker, for premiums which accrued due to the testator, the defendant cannot set off returns of premium which became due after the testator's death. (*d*) And a defendant, sued by an executor for money due to the testator, cannot set off the amount of a promissory note given by the testator, but not due till after his death, and after the commencement of the action. (*e*)

But to an action against an executor, on an account stated with him of moneys due from him as executor, a set-off for debts due from the plaintiff to the testator in his lifetime may be pleaded; (*f*) on the ground, that an account stated by an executor, as such, must be taken to show a debt due from his testator to the other party (*g*)

In an action against a husband for his own debt, he is not allowed to set off a debt due to him in right of his wife. (*h*) Nor Husband and wife. can a debt due from the plaintiff's wife *dum sola*, be set off in an action by the husband only; unless the latter has, on some new consideration, made the debt his own, so that the wife would not be a necessary party to an action for the recovery thereof. (*i*) So, if a note be made payable to a married woman, after coverture, her husband may sue alone thereon; and a debt due from the wife before marriage cannot be set off against his claim. (*j*)

But it seems that in an action by husband and wife, for a debt due to the wife *dum sola*, the defendant might, at common law, set off a debt due from the wife *dum sola*. (*k*)

It has also been held that, in an action by a mere trustee, the defendant may set off a debt due to him, from the party Equitable set-off. who is beneficially entitled to the money sought to be recovered. Thus, in debt on bond, the defendant pleaded that it was given for securing 100*l.*, lent to the defendant by one E. C.; and that the bond was given by her direction to the plaintiff, in trust for her; and that E. C., before action brought, was indebted

(*d*) Underwood *v.* Robertson, 4 Camp. 342.

(*e*) Rogerson *v.* Ladbroke, 1 Bing. 93; Houston *v.* Robertson, 6 Taunt. 448, 451.

[A defendant cannot generally set off a payment made by him on behalf of the plaintiff, after suit brought. Morrison *v.* Moreland, 15 Serg. & R. 61.]

(*f*) Blakesley *v.* Smallwood, 8 Q. B. 538.

(*g*) Per Cur. Rees *v.* Watts, 11 Exch. 410, 416.

(*h*) Paynter *v.* Walker, and Cooke *v.* Dixon, Bull. N. P. 179.

(*i*) Wood *v.* Akers, 2 Esp. 594.

(*j*) Burrough *v.* Moss, 10 B. & C. 558.

(*k*) See per Bayley J. *Ib.* 562. *See quære*, since the 33 & 34 Vict. c. 93, s. 12.

to the defendant in more money than the amount of the bond; and a demurrer to this plea was withdrawn by the advice of the court of common pleas. (*l*)

But it is clear that, at the present day, such a plea would not be held good, (*m*) unless it were pleaded by way of equitable defence.

And so a judgment recovered by a party as trustee, cannot be set off against a judgment obtained against him individually. (*n*)

So it was held that a defendant could not plead, by way of set-off, a bond debt of the plaintiff, which had been assigned to the defendant by a third person, to whom and for whose use it was originally given; because the court could not notice any other than legal rights. (*o*)

And so, in the case of *Tucker v. Tucker*, (*p*) it was held that

(*l*) *Bottomley v. Brooke*, M. 22 Geo. 3, cited 1 T. R. 621; *Rudge v. Birch*, M. 25 Geo. 3 B. R. cited Ib. 622. See *Fenner v. Mears*, 2 Bl. 1271; *Fair v. M'Iver*, 16 East, 136; *Crosse v. Smith*, 1 M. & S. 545, 556; *Morrison v. Parsons*, 2 Taunt. 412; *Jarvis v. Chapple*, 2 Chit. 387.

(*m*) See per Cur. *Isberg v. Bowden*, 8 Ex. 852, 860, where *Bottomley v. Brooke*, and *Rudge v. Birch* are said to have been overruled; [*Campbell v. Hamilton*, 4 Wash. C. C. 93; *Sheldon v. Kendall*, 7 Cush. 217; *Hurlbert v. Pacific Ins. Co.* 2 Sumner, 472; *Barrett v. Barrett*, 8 Pick. 342; *Williams v. Ocean Ins. Co.* 2 Met. 303; *Savage v. Davis*, 7 Wend. 223.] In *Wake v. Tinkler*, 16 East, 38, Lord Ellenborough said he was more inclined to restrain, than to extend, the doctrine of the cases of *Bottomley v. Brooke*, and *Rudge v. Birch*; and in *Scholey v. Mearns*, 7 East, 153, Mr. Marryatt said, that they had been overruled in the case of *Lane v. Chandler*, in the exchequer. So, in *Tucker v. Tucker*, 4 B. & Ad. 745, Little-dale J. denied that *Bottomley v. Brooke* was law; and Parke J. said, that if the words of the statute had been looked at, *Bottomley v. Brooke*, and *Rudge v. Birch*, would hardly have been decided as they were.

(*n*) See per Tindal C. J. *Bristowe v. Needham*, 7 M. & G. 648, 649.

(*o*) *Wake v. Tinkler*, 16 East, 36. [A bond given by the plaintiff to A., for the use of B., and not payable to assigns, and transferred by A. to the defendant, cannot be set off in an action on a bond given by the defendant to the plaintiff. *Wolf v. Beales*, 6 Serg. & R. 244. And, per Gibson J. delivering the opinion of the court, "It may be stated as a general rule, that the person having the right of action may set off a debt due to him as trustee, against a debt due by him in his own right. On the other hand, where there is not a legal right of action, but there has been an equitable assignment of the property in the thing in action, the *cestui que trust* may set off his right of property against a demand on him in his own right; and there is no difference in this respect, between an ordinary bond transferred by an equitable assignment, and one, in which the right of action was, as in this case, originally severed from the right of property by the terms of the instrument. So, a debt to, or from, the *cestui que trust*, may be set off in an action commenced against, or by the trustee in right of the trust. The right to set-off must depend either on the right of action or the right of property, and here the defendant had neither."]

(*p*) 4 B. & Ad. 745.

an equitable demand could not be the subject of a set-off at law. There S. gave a bond conditioned for the payment of money; the obligee made C. his executrix and residuary legatee, and died; C. proved the will, assented to the bequest, and died, not having fully administered; leaving E. executrix of the executrix C., in trust for her, E.'s own benefit. A sum, due on the bond in the first testator's time, remained unpaid. C. during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for payment of a sum of money to the use of S., if C. should marry and survive her intended husband. She did marry and survive him; and, the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond; and it was held that, in such action, the claim of E. upon S.'s bond could not be set off.

And it seems that, where the assignee of a *chose in action* sues thereon, at law, in the name of the assignor, the debtor cannot plead to that action, by way of equitable set-off, a debt which accrued due to him from the assignor, after notice of the assignment, although under a contract made before that time. (q)

But, in equity, the defendant may set off against a debt due from him to the plaintiff, a debt due from the plaintiff to a trustee for the defendant, just as if it had been a legal debt due to the defendant himself; and such a set-off may now be pleaded, at law, by way of equitable defence. (r)

Where, however, to an action for freight, the defendant pleaded a set-off; and the plaintiff replied, on equitable grounds, that while the freight was being carried he assigned it for value to A., of which the defendant, before the freight became due and before action, had notice, and that the plaintiff was suing only as trustee for A.; this was held to be no answer to the plea. (s)

Set-off
against prin-
cipal, in ac- Again: it would seem, that where an agent may maintain an action in his own name, his demand is not in

(q) *Watson v. Mid Wales Railway Company*, L. R. 2 C. P. 593. In equity, the assignee of a *chose in action* takes it subject to all the equities which are available against the assignor. *Mangles v. Dixon*, 3 H. L. Cas. 702. But the person who is entitled to the benefit of such equities may release them, either expressly by words or

writing, or impliedly, by his conduct. See *Higgs v. Assam Tea Company*, L. Rep. 4 Ex. 387; *Re Northern Assam Tea Company*, L. R. 10 Eq. 458.

(r) *Cochrane v. Green*, 9 C. B. N. S. 448.

(s) *Wilson v. Gabriel*, 4 B. & S. 243.

general subject to any set-off which the defendant may have against the principal. (*t*) tion by agent.

On the other hand, however, where a principal has allowed one who is not known to be a mere factor or agent (*u*) to appear to be the true owner of goods, and to sell them as his own; (*v*) the principal cannot sue for the price, without giving the purchaser the benefit of any set-off which he may have previously acquired against the agent. (*w*) But where a factor sells *as factor*, whether in his own name or not, the purchaser cannot, in an action by the principal, set off a debt due to him from the factor. (*x*) Set-off against agent, in action by principal.

So it has been held, that where a town agent, an attorney, is sued by a client of his principal, for the recovery of money received by him, the town agent, in a particular cause; (*y*) he has no right to deduct from such money, the general balance due to him from the principal; but only the costs in the particular suit conducted by him, the town agent, for the client, and in which the money was recovered. (*z*)

3. "The Bankruptcy Act, 1869," (*a*) s. 39, enacts, that "Where there have been *mutual credits, mutual debts*, or other *mutual dealings* between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other, in respect of such mutual dealings; and the sum due from the one party shall be set off against the sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a Set-off in case of bankruptcy.

(*t*) *Isberg v. Bowden*, 8 Exch. 852. And see observations in that case on *Jarvis v. Chapple*, 2 Chit. 387, and *Coppin v. Craig*, 7 Taunt. 243, which have been supposed to lay down a contrary doctrine. See, also, *Drinkwater v. Goodwin*, Cowp. 251, 256; *Russell on Factors*, 249; [*Royce v. Barnes*, 11 Met. 276.]

(*u*) See *Semenza v. Brinsley*, 18 C. B. N. S. 467.

(*v*) See *Addington v. Magan*, 10 C. B. 576; 20 L. J. C. P. 82; *Dresser v. Norwood*, 14 C. B. N. S. 574; 17 Ib. 466.

(*w*) See per Cur. *Oulds v. Harrison*, 10 Exch. 572, 580; *Purchell v. Salter*, 1 Q.

B. 197; *Pigeon v. Osborne*, 12 A. & E. 715; *George v. Claggett*, Peake Add. Ca. 131; *Carr v. Hinchcliffe*, 4 B. & C. 547; [*Gardner v. Allen*, 6 Ala. 187; *Parker v. Donaldson*, 2 Watts & S. 9.

(*x*) *Fish v. Kempton*, 7 C. B. 687; 18 L. J. C. P. 206.

(*y*) Such an action, however, is not in general maintainable; *Robbins v. Fennell*, 11 Q. B. 248.

(*z*) *Moody v. Spencer*, 2 D. & R. 6; *White v. Royal Exchange Assurance*, 1 Bing. 20.

(*a*) 32 & 33 Vict. c. 71.

person shall not be entitled under this section, to claim the benefit of any set-off against the property of any bankrupt in any case where he had, at the time of giving credit to the bankrupt, notice of an act of bankruptcy committed by such bankrupt, and available against him for adjudication."

And by the 12 & 13 Vict. c. 106, s. 171, — which regulates the right of set-off in cases of bankruptcy which occurred before the commencement of "The Bankruptcy Act, 1869," — this right is conferred wherever "there has been *mutual credit* given by the bankrupt and any other person, or where there are *mutual debts* between the bankrupt and any other person;" . . . "*and every debt or demand thereby made provable against the estate of the bankrupt, may also be set off*" "*against such estate*: provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." (b)

These enactments, it will be observed, extend the right of set-off, in the cases to which they apply, considerably beyond the limits to which that right can be carried in ordinary cases; for, under them, a set-off is allowed, not only where there are mutual debts between the parties, but likewise, where there are mutual credits or other mutual dealings. And, accordingly, it becomes a question of some importance, what particular state of dealings does or does not entitle a party to such set-off.

The leading rule on the subject of mutual credits was, that to be within the meaning of the bankrupt laws, they must be such credits as would terminate in debts; *e. g.* where a debt was due from one party, and credit was given by him on the other, for a sum of money payable at a future day, and which would then become a debt; or where there was a debt on one side, and a delivery of property with directions to turn it into money, on the other. (c) Or, perhaps, the true principle in such cases may be stated thus: that the statute applied not merely to credits which must, *ex necessitate*, terminate in debts; but to all credits which had a natural tendency to terminate in debts, and not in claims differing in their nature from debts. (d)

(b) This section is substantially the same as the 6 Geo. 4, c. 16, s. 50, and the 5 Geo. 2, c. 30, s. 28, on which the greater number of the cases quoted below were decided.

(c) Per Cur. *Rose v. Hart*, 8 Taunt.

499, 506; and see *Naoraji v. Chartered Bank of India*, L. R. 3 C. P. 444; *Astley v. Gurney*, 4 Ib. 714; *Young v. Bank of Bengal*, 1 Moo. P. C. 150.

(d) 2 Smith L. C. 180.

And although "The Bankruptcy Act, 1869," s. 39, makes use of the term "mutual dealings," as well as of the terms "mutual credits" and "mutual debts," which alone are to be found in the older bankrupt acts; still, — inasmuch as the term "mutual dealings" in that section, would probably be held to mean such dealings only as, in the natural course of business, would end in debts, (*e*) — it is believed that the following cases, decided under the old law, will equally serve to illustrate the manner in which the above rule is to be applied under the new.

First, then, it is held that a set-off cannot be pleaded under the bankrupt acts where the action is for unliquidated damages merely. (*f*)

But it is held, that the acceptance of a bill of exchange by the defendant, for the accommodation of the bankrupt, is a credit within the meaning of the statute. (*g*)

So, an agreement to accept a bill of exchange, in payment for goods sold and delivered by the bankrupt to the defendant, was held to create such a credit as was intended by the statute. And accordingly, in an action by the assignees of a bankrupt against the defendant, for not accepting bills of exchange pursuant to such an agreement; it was held, that the latter might set off a debt due to him, for money lent to the bankrupt before his bankruptcy. (*h*)

So where, to an action for money had and received to the use of the assignees of J. S., the defendant pleaded, that before notice of the bankruptcy he indorsed a bill for the accommodation of J. S., and discounted another for him, both of which he was obliged to take up after the bankruptcy; and that, before the bankruptcy, J. S. lent him a check, the proceeds of which he received after the bankruptcy, which was the same money now sued for, and against which he claimed to set off the amount of the dishonored bills; this was held to be a good plea. (*i*) And where bills had been indorsed in blank by E. & Co. to the defendants, who were their bankers, for the purpose of their being discounted; and, before

(*e*) This opinion is founded on the general language of the 32 & 33 Vict. c. 71, s. 39, as well as on the fact, that that section does not contain any clause, analogous to that contained in the 12 & 13 Vict. c. 106, s. 171, whereby "every debt or demand thereby made provable against the estate of the bankrupt," was made a subject of set-off.

(*f*) *Bell v. Cary*, 8 C. B. 887.

(*g*) *Bittleston v. Timmis*, 1 C. B. 389, 398; *Russell v. Bell*, 8 M. & W. 277; *Smith v. Hodson*, 4 T. R. 211.

(*h*) *Gibson v. Bell*, 1 Scott, 712; and see *Groom v. West*, 8 A. & E. 758.

(*i*) *Hulme v. Mugglestone*, 3 M. & W. 30.

the bills became due, E. & Co. became bankrupt, — the defendants having then in their hands a sum of money belonging to E. & Co., much less than the amount of the bills; and the assignees of E. & Co. sued the defendants to recover the money of E. & Co. which was so in their hands, as aforesaid; it was held, that the defendants were entitled, as indorsees of the bills, to set them off in that action. (*j*)

So the holder of a bill or note of the bankrupt, is entitled to set off the amount against a debt due from him to the estate, although he did not take up the instrument until after the bankruptcy, provided he held it at any time before the bankruptcy occurred. (*k*)

But a mere agreement to indorse a bill of exchange to the bankrupt, does not create a credit within the statute. (*l*)

So the holder of a bill or note, to be within the statute, must not be a mere agent or trustee, holding it for the benefit of a third person. For the statute does not authorize a set-off where the debt, though legally due to the debtor from the bankrupt, and recoverable by him in a cross action, would not be recovered for his own benefit. (*m*) Thus where, in an action by the assignees of a bankrupt for the price of a phaeton, — which had been sold by the bankrupt to the defendant on the terms of paying for it in ready money, — the latter sought to set off a dishonored acceptance of the bankrupt, in which he, the defendant, had no interest, but which he had obtained from the holder in order that he might use it for this purpose; it was held that such acceptance could not be made the subject of a set-off under the statute. (*n*) And where A., the holder of a bill, returned it to his indorser before the bankruptcy of the acceptor, and entirely closed the account and transaction as to such bill with the indorser; it was held, in an action by the assignees of the acceptor against A., that the latter could not, by taking back the bill from the indorser, for the purpose of claiming credit for the amount, set off the same against a debt due from him to the bankrupt before his bankruptcy. (*o*)

(*j*) *Alsager v. Currie*, 12 M. & W. 751.

(*l*) *Rose v. Sims*, 1 B. & Ad. 521.

(*k*) *Collins v. Jones*, 10 B. & C. 777; *Bolland v. Nash*, 8 B. & C. 105; overruling *Ex parte Hale*, 3 Ves. 304. See, further, for cases as to mutual credit, *Key v. Flint*, 8 Taunt. 21; 1 Swanst. 30; *Ex parte Wagstaffe*, 13 Ves. 65; *Buchanan v. Findlay*, 9 B. & C. 744; *Dickson v. Cass*, 1 B. & Ad. 343; *Dickson v. Evans*, 6 T. R. 57.

(*m*) Per Cur. *Foster v. Wilson*, 12 M. & W. 191, 204.

(*n*) *Lackington v. Coombes*, 8 Scott, 312.

(*o*) *Belcher v. Lloyd*, 10 Bing. 310; *Fair v. M'Iver*, 16 East, 130.

But, as we have said, a mutual credit, within the meaning of the bankrupt laws, may arise not only where there have been money transactions between the parties, but also by the delivery of goods by the bankrupt before his bankruptcy, to a person to whom he is indebted at the time of such delivery. (*p*) Thus, where C., the bankrupt, was indebted to F., and had intrusted him with his share or interest in a string of pearls, to be sold by F., and the profit on such share to be paid to C.; and F. sold the pearls after C.'s bankruptcy; it was held, in an action against F. by the assignees of C., to recover his share of the profit, that F. was protected from that claim by the clause of mutual credits. (*q*) To the same effect is the case of *Olive v. Smith*. (*r*) And in a subsequent case, in which the goods themselves were not intrusted by the bankrupt to his creditor, but where goods were consigned by the bankrupt to a third party, under an arrangement between the former and his creditor, whereby the proceeds of such goods must necessarily pass through the hands of the creditor; it was held that this was a case of mutual credit within the act. (*s*)

So, by the express words of the 12 & 13 Vict. c. 106, s. 171, any demand *provable* under the bankruptcy might be made the subject of a set-off thereunder. (*t*) And hence it would appear that, under that statute, a claim on a guaranty for a sum certain might be so set off; because, when such sum became due, the claim would be provable as a debt; and, before it became due, it would be provable as a debt to become due on a contingency. (*u*)

But where A., B., and C., dissolved partnership, there being, at that time, due from the firm to one H., a sum of 51,891*l.* 12*s.*, and from A. to the firm the sum of 6,817*l.* 9*s.* 8*d.*; and it was agreed that A. should pay to B. and C., the debt due from him to the firm; and that B. and C. should keep the stock and assets of the firm, and should pay H.; but B. and C. became bankrupts whilst the greater part of H.'s debt still remained unpaid; it was held, that A.'s liability to pay H. was in the nature of a guaranty, in

(*p*) See *Rose v. Hart*, 8 Taunt. 499, 506; *Astley v. Gurney*, L. R. 4 C. P. 714.

(*q*) *French v. Fenn*, Cooke B. L. 536.

(*r*) 5 Taunt. 56.

(*s*) *Easum v. Cato*, 5 B. & Ald. 861.

(*t*) The 32 & 33 Vict. c. 71, s. 39, does not contain any similar provision. To an action by the trustees under a deed of ar-

angement, within the "Bankruptcy Act, 1861," s. 192, the defendant is entitled to set off any debt which accrued before the registration of the deed. *Stanger v. Miller*, L. Rep. 1 Ex. 58.

(*u*) See *Re Willis*, 4 Exch. 530; 19 L. J. Exch. 30, 32.

respect of which he might never be called upon to pay anything; and that, consequently, it could not form the subject of a mutual credit. (*x*)

And, as is the case under the statutes of set-off, it is held that the demands in respect of which a set-off is claimed under the bankrupt acts, must be due in the same right. Thus, to an action for money had and received to the use of the assignees, the defendant cannot plead a set-off for money due to him from the bankrupt. (*y*)

And so where A., who was tenant of certain premises to B., let them to C., and afterwards became bankrupt; and, at the time of the bankruptcy, there was an arrear of rent due from C. to A.; it was held that C. could not, in an action by the assignees of A. to recover that rent, set off a sum paid by him, C., to B., under a distress for rent which accrued due from A. to B., after the bankruptcy, in respect of the same premises. (*z*)

But where the plea, whilst it confesses the receipt of money to the use of the assignees, shows how their title to that money arose, viz. out of a credit given *by* the bankrupt, — a credit given *to* the bankrupt may be pleaded by way of set-off; because it will then appear that the debt sued for, and the debt set off, were respectively due *to and from the estate*. (*a*) And so, in the case of *Kinder v. Butterworth*, (*b*) it was agreed by the court, that where the debt sued for and the debt set off both accrued after the act of bankruptcy, such a set-off would be valid, although the declaration was for money had and received to the use of the plaintiffs, as assignees.

So, in order that a case may be protected as one of mutual credit, it must appear that such mutual credit existed at the time of the bankruptcy. (*c*)

And it must also appear, that the party who claims the set-off had not, when the credit was given, any notice of a previous act of bankruptcy by the bankrupt committed. (*d*)

(*x*) *Abbott v. Hicks*, 7 Scott, 715; and see *Sampson v. Burton*, 2 B. & B. 89; *Arbouin v. Tritton*, Holt, 408; *Wood v. Dodgson*, 2 M. & S. 195.

(*y*) *Groom v. Mealey*, 2 Scott, 171;

Wood v. Smith, 4 M. & W. 525.

(*z*) *Graham v. Allsopp*, 3 Exch. 186.

(*a*) *Bittleston v. Timmis*, 1 C. B. 389, 399, 400.

(*b*) 6 B. & C. 42.

(*c*) *Boyd v. Mangles*, 16 M. & W. 337, 344.

(*d*) See 32 & 33 Vict. c. 71, s. 39; 12 & 13 Vict. c. 106, s. 171; and *Dickson v. Cass*, 1 B. & Ad. 343.

4. It is also now settled that in an action for calls, brought by the liquidator against a contributory to a *limited* company, — which is being *voluntarily wound up* under “The Companies Act, 1862,” (e) — the defendant may set off a debt due to him from the company. (f)

Set-off under winding-up clauses of “Companies Act, 1862.”

And, in like manner, a shareholder in an *unlimited* company, which is being *wound up by the court*, may set off a debt due to him from the company, against calls made on his shares, under the winding up. (g)

But where a *limited* company is being *wound up by the court*, or under *the supervision of the court*, a contributory is not entitled, in the absence of special agreement, to set off money due to him from the company, against a call made either before or during the winding up. (h)

5. Set-off must now, in all cases, be specially pleaded. (i)

Pleading a set-off, &c.

And the defendant must in general give the same evidence in support of a plea of set-off, as he would be bound to give, if he were suing for the recovery of the debt claimed to be due to him.

Formerly, where the amount proved under a plea of set-off pleaded to the whole declaration, did not cover the plaintiff’s demand, the defendant could not have a verdict on the plea for the amount proved, but it went merely in reduction of damages. (j) And where, in debt for money had and received, and on an account stated, to the amount of 19*l.* 10*s.*, — the claim in the particulars of demand being for 6*l.* 10*s.* for money lent, — the defendant pleaded a set-off of 50*l.*; but at the trial he proved a set-off of 6*l.* 10*s.* only; it was held, that he was not entitled to the verdict. (k) But now, by the 15 & 16 Vict. c. 76, s. 75, pleas of set-off are to be taken distributively; and “a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered.”

(e) 25 & 26 Vict. c. 89.

(f) Brighton Arcade Co. v. Dowling, L. R. 3 C. P. 175.

(g) Gibbs and West’s case, L. R. 10 Eq. 312.

(h) Brighton Arcade Co. v. Dowling, L. R. 3 C. P. 175; Calisher’s case, L. R. 5

Eq. 214; Sankey Brook Coal Co. v. Marsh, L. R. 6 Ex. 185.

(i) Reg. Gen. H. T. 1853, r. 8; Graham v. Partridge, 1 M. & W. 395; and see 15 & 16 Vict. c. 76, Sched. No. 41.

(j) Rodgers v. Maw, 15 M. & W. 444.

(k) Roche v. Champion, 1 Exch. 10.

If, to a plea of set-off, the plaintiff reply, "that he was not *nor is* indebted, &c.;" he may, under this replication, prove that he has paid the amount claimed as a set-off. (*l*) So, the plaintiff may show, under this replication, that the amount claimed to be set off has been paid by a third party; and that he had ratified such payment at the time of the trial. (*m*) But the plaintiff cannot prove payment, if he merely reply that he "*never was* indebted." (*n*)

So, it is a good replication to a plea of set-off that, after plea pleaded, the plaintiff paid the debt. (*o*)

So, if there be an action against two or more to recover a joint debt, and the defendants plead a set-off; it is a good replication to such plea that, before plea pleaded, one of the defendants had become bankrupt. (*p*)

So the plaintiff may prove, under *nil debet*, that the debt sought to be set off is due from himself and a third party. (*q*)

But the plaintiff cannot give in evidence, under the replication of *nil debet* to a plea of set-off, his discharge under the bankruptcy act; (*r*) or that the debt sought to be set off is barred by the statute of limitations; (*s*) and he must, therefore, reply the same specially.

Where the set-off is upon a bond, it must be pleaded specially in bar; and the plea must aver how much is really due thereon for principal and interest. (*t*) And the plaintiff in his replication, may either deny the bond by pleading *non est factum*, or he may plead a discharge thereof; or he may traverse that he owes so much thereon as is stated in the plea; and this traverse is good, although the sum alleged to be due be stated in the plea under a *videlicet*. (*u*)

If the defendant do not deliver particulars of his set-off, pursuant to a judge's order made in that behalf, he cannot give evidence of the same at the trial. (*x*)

Where there are cross demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account

(*l*) *Stockbridge v. Sussams*, 3 Q. B. 239.

(*m*) *Simpson v. Egginton*, 10 Exch. 845.

(*n*) *Miller v. Atlee*, 3 Exch. 799.

(*o*) *Eyton v. Littledale*, 4 Exch. 159.

(*p*) *New Quebrada Co. v. Carr*, L. R. 4 C. P. 651.

(*q*) *Arnold v. Bainbrigge*, 9 Exch. 153.

(*r*) See *Ford v. Dornford*, 8 Q. B. 583.

(*s*) *Chapple v. Durston*, 1 C. & J. 1.

(*t*) *Attwool v. Attwool*, 2 E. & B. 23.

(*u*) *Symmons v. Knox*, 3 T. R. 55;

Grimwood v. Barrit, 6 T. R. 460.

(*x*) *Young v. Geiger*, 6 C. B. 553; *Ibbett v. Leaver*, 16 M. & W. 770.

in the first instance, but he may prove only the balance which he claims; and, after the defendant has proved his set-off, the plaintiff may prove other parts of his account, to show that a larger sum was due. (*y*)

Where the defendant pleads a set-off, but does not appear at the trial to offer evidence in support of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set off; or, it is said, he may take a verdict for the smaller sum, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action shall be brought for the amount of the set-off. (*z*)

12. Infancy.

We have already treated of the capacity of an infant to contract, and of the cases in which he is liable upon his contracts; (*a*) and it now remains for us to state, shortly, the mode of taking advantage of this defence.

An infant defendant must, in all cases, appear and defend by *guardian*; (*b*) and, where judgment is given against the infant, he may assign his appearance by attorney as a Must appear by guardian. ground of error. (*c*)

So, the guardian must be admitted before plea, (*d*) and the admission must be stated in the plea. (*e*)

But if the defendant be of full age at the time he appears and pleads his infancy, he may appear and plead by attorney.

(*y*) *Williams v. Davies*, 1 C. & M. 464. [But the plaintiff cannot file a counter set-off to the defendant's set-off. *Hudnall v. Scott*, 2 Ala. 569; *Ulrich v. Berger*, 4 Watts & S. 19; *Hall v. Cook*, 1 Ala. 629.] (*z*) *Laing v. Chatham*, 1 Camp. 252; *Chapman v. Drunning*, 1 Chit. 178; *Tidd*, 9th ed. 668.

(*a*) *Ante*, 193.

(*b*) [*Comstock v. Carr*, 6 Wend. 526; *Alderman v. Tirrell*, 3 John. 418; *Bustard v. Gates*, 4 Dana, 429, 436; *Cook v. Totton*, 6 Dana, 108; *Knapp v. Crosby*, 1 Mass. 479; *Clarke v. Gilmanton*, 12 N. H. 515, 517.] And an infant plaintiff must sue by *prochein ami* or guardian. 2 Wms. Saund. 117 f, note (1); *Tidd*, 9th ed. 99. In

the county courts, an infant may sue for any sum not exceeding 20*l.*, which may be due to him for wages or piece-work, or for work as a servant, in the same manner as if he were of full age. 9 & 10 Vict. c. 95, s. 64.

(*c*) Per Abbott C. J. *Bird v. Pegg*, 5 B. & Ald. 418, 419; *Frescobaldi v. Kinaston*, 2 Str. 784; 2 Wms. Saund. 117 f, note (1), 212 a, 4, 5; [*Arnold v. Stanford*, 14 John. 417; *Mackey v. Grey*, 2 John. 192; *Maynard v. Downer*, 13 Wend. 575.] But the *plaintiff*, if he fail in the action, cannot maintain error on this ground. *Bird v. Pegg*, 5 B. & Ald. 418.

(*d*) See *Tidd*, 9th ed. 99.

(*e*) 2 Wms. Saund. 217 g, note (1).

Plea of. Infancy must now, in all cases, be pleaded specially. (*f*)

If, to a plea of infancy, the plaintiff reply denying the infancy, it is incumbent on the defendant to prove his infancy; evidence under plea of. evidence of this fact being more peculiarly within his own power. (*g*)

And the defendant may establish his infancy by calling persons who can speak to the time of his birth; or by declarations on the subject, made by deceased members of his family. (*h*) But an entry in a parish register of baptisms, as to the time of the birth of a child, is not evidence of its age. (*i*)

If the plaintiff reply that the goods, &c., were necessaries, no evidence of the infancy need be given; but it lies upon the plaintiff to prove the defendant's rank and situation in life, and that the goods, &c., were suitable to his means and station. (*k*)

And so, where the plaintiff replies a ratification by the defendant after he attained the age of twenty-one, the plaintiff need only, in the first instance, prove the defendant's promise; and it lies on the latter to prove his infancy. (*l*) But such subsequent promise will not be of any avail to the plaintiff, unless it appear to have been made before the commencement of the action. (*m*)

The nature of the confirmation which is necessary, in order to establish the defendant's liability in such a case, has been already fully considered. (*n*)

Costs. Costs are payable by an infant defendant. (*o*)

13. Coverture.

The incapacity of married women to contract, and the exceptions to the general rule on this subject, have been already noticed. (*p*)

(*f*) Reg. Gen. H. T. 1853, r. 8. For the form of plea, &c., see Chit. jun. Pl. 3d. ed. 442-444.

(*g*) Borthwick v. Carruthers, 1 T. R. 648.

(*h*) Roscoe on Ev. 11th ed. 392.

(*i*) Wihen v. Law, 3 Stark. 63; Rex v. Clapham, 4 C. & P. 29. As to evidence by non-parochial registers, see 3 & 4 Vict. c. 92.

(*k*) See ante, 196, 201, 202.

(*l*) Borthwick v. Carruthers, 1 T. R. 648; and see Hartley v. Wharton, 1 A. & E. 934.

(*m*) Thornton v. Illingworth, 2 B. & C. 824.

(*n*) Ante, 215.

(*o*) Tidd, 9th ed. 101, citing Anderson v. Warde, Dy. 104; Hamlen v. Hamlen, 1 Bulst. 189; Gardiner v. Holt, 2 Str. 1217.

(*p*) Ante, 227, 251.

1. If a married woman sue alone upon a contract made before or during marriage, the defendant can avail himself of the Coverture of plaintiff. *Coverture*, only by plea *in abatement*. (*q*) But the marriage of a woman plaintiff or defendant, after the commencement of the suit, does not cause the action to abate. (*r*)

So if a married woman draw a bill on A., which he accepts; and she afterwards indorses it to B., and B. sues A. on the bill; A. cannot plead the *coverture* of the drawer as a defence to that action. (*s*)

2. If the defendant be married at the time of pleading, she must plead in person and not by attorney. (*t*) Coverture of defendant.

And a woman defendant, who has declared herself to be a *feme sole*, and, as such, has executed deeds, and maintained actions, is not, therefore, *estopped* from setting up the defence of *coverture*. (*u*)

Coverture of the defendant must be pleaded specially. (*x*) Plea of.

Of course, it is for the defendant to prove her marriage if it be denied. (*y*) And this may be done, either by producing an examined copy of the register, and proving her identity, that is, that she is the person described in the register; (*z*) or by the testimony of parties who were present at the ceremony; and this without showing the publication of banns, or a license to marry. And, indeed, if it be shown that the defendant and the person alleged in the plea to be her husband, have, for a length of time, cohabited as husband and wife, this, of itself, is evidence to go to the jury in proof of their being married. (*a*)

But as there is no presumption of law, that a person is alive who has been absent and not heard of for seven years, (*b*) it is incumbent on the defendant, in such a case, not only to prove the fact of

(*q*) *Ante*, 226.

(*z*) See 2 Ph. Ev. Ch. 12, s. 3; 2 Stark.

(*r*) 15 & 16 Vict. c. 76, s. 141; and see *per Coleridge J. Stanton v. Collier*, 3 E. & B. 274, 275.

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(*s*) *Smith v. Marsack*, 6 C. B. 486; 18 L. J. C. P. 65.

(*a*) *Woodgate v. Potts*, 2 C. & K. 457; *Leader v. Barry*, 1 Esp. 353; *Key v. Duchesse de Pienne*, 3 Camp. 123.

(*t*) 2 Wms. Saund. 209 c.

(*b*) *Nepean v. Doe d. Knight*, 2 M. & W. 894; *Doe v. Jesson*, 6 East, 80, 85; *Doe d. France v. Andrews*, 15 Q. B. 756,

(*u*) *Davenport v. Nelson*, 4 Camp. 26.

760.

(*x*) Reg. Gen. H. T. 1853, r. 8.

(*y*) Proof of *plaintiff's* marriage; *Wilson v. Mitchell*, 3 Camp. 393.

her marriage, but also to prove that her husband was alive, within seven years preceding the time when the contract was entered into. (c)

14. *Bankruptcy.*

The law of bankruptcy, as it affects the contract of a bankrupt to pay a debt barred by his order of discharge; and the effect of contracts made with a bankrupt before the order of discharge takes effect, have been already discussed; (d) and it now remains for us only to consider the effect of the order of discharge, on the contracts of the bankrupt made before his bankruptcy, and how the defence of bankruptcy must be pleaded and proved.

1. As to the effect of the order of discharge, on contracts made by a bankrupt before his bankruptcy, the rule is, that the creditor's inability to prove his debt, claim, or demand, and the continuing responsibility of the bankrupt, are convertible terms; the privilege of the former, and the discharge of the latter, being coextensive and commensurate. (e)

And, accordingly, it was enacted by the 24 & 25 Vict. c. 134, s. 161, that the order of discharge would discharge the bankrupt from all debts, claims, and demands provable under his bankruptcy; and that if, thereafter, he should be arrested, or have any action brought against him for any such debt, claim, or demand, he should be discharged upon entering an appearance; (f) and might plead, in general, that the cause of action accrued before he became bankrupt.

And now, by the 32 & 33 Vict. c. 71, s. 49, the effect of the order of discharge is, to release the bankrupt from all debts provable under the bankruptcy, except —

1st. Debts or liabilities incurred by means of fraud or breach of trust; 2dly. Debts or liabilities whereof the bankrupt has obtained forbearance by fraud; 3dly. Debts due to the crown; and

(c) *Hopewell v. De Pinna*, 2 Camp. 113.

(d) *Ante*, 263, 265.

(e) See per Cur. *Young v. Taylor*, 8 Taunt. 315, 321; *Lane v. Burghart*, 4 Scott N. R. 287; S. C. 1 Q. B. 933; *Skinner's Company v. Jones*, 4 Scott, 271, 283; *Ex parte Groome*, 1 Atk. 119; *Chilton v. Whiffin*, 3 Wils. 13; *Cowley v.*

Dunlop, 7 T. R. 565; and see per Tindal C. J. *Affalo v. Fourdrinier*, 6 Bing. 306, 308.

(f) The judge, before whom the application was made to discharge the bankrupt from custody, might receive affidavits to show that the order of discharge was void. *Clark v. Smith*; 3 C. B. 982.

4thly. Debts with which the bankrupt stands charged at the suit of the crown, or of any person, for any offence against a statute relating to any branch of the public revenue; or at the suit of the sheriff or other public officer, on a bail-bond entered into for the appearance of any person prosecuted for any such offence.

And even as to these last two kinds of debts, the order of discharge will release the bankrupt, if the commissioners of the treasury certify in writing their consent to his being discharged therefrom.

But the only effect of the order of discharge is, to discharge the person and goods (*g*) of the bankrupt; it is no release of collateral remedies. Where, therefore, a landlord distrained the goods of A. on his tenant's premises, and the tenant afterwards became bankrupt and obtained his certificate; it was held that the landlord had a right, in a replevin at the suit of A., to avow for the return of the goods. (*h*)

Does not release collateral remedies;

And, in like manner, the order of discharge will not discharge the bankrupt's partner, or any one who was jointly bound, or has made a joint contract with him. (*i*)

nor joint contractor.

It is also a general rule, that if a debt may be proved under a bankruptcy, the bankrupt, when discharged, is not only discharged from liability for such debt, but also from any consequential damages resulting or arising from the non-payment thereof. (*k*)

Releases from consequential damages;

It was likewise enacted, by the 12 & 13 Vict. c. 106, s. 181, that if a creditor had, before the bankruptcy, obtained a judgment at law, or a decree in equity, for a debt or demand in respect of which he afterwards proved under the bankruptcy, he might also prove for the costs he had incurred, although they were not taxed at the time of the bankruptcy.

and costs.

(*g*) *Davis v. Shapley*, 1 B. & Ad. 54.

(*h*) *Newton v. Scott*, 9 M. & W. 434; S.C. (in error), 10 M. & W. 471.

(*i*) 32 & 33 Vict. c. 71, s. 50; and see 24 & 25 Vict. c. 134, s. 163. Before the statute 3 & 4 Will. 4, c. 42, s. 9, if one of several debtors became bankrupt and obtained his certificate, it was necessary to join him as a defendant, or the defendant might have pleaded the non-joinder in abatement. But that statute renders it unnecessary to join the bankrupt in such case; and, if the non-joinder be pleaded in

abatement, the bankruptcy and certificate may be replied. And where one member of a firm becomes bankrupt, the court may authorize the trustee, with the consent of the creditors certified by a special resolution, to commence and prosecute any action or suit in names of the trustee and of the bankrupt's partner. 32 & 33 Vict. c. 71, s. 105; and see 12 & 13 Vict. c. 106, s. 152.

(*k*) *Van Sandau v. Corsbie*, 3 B. & Ald. 13.

And it has been held that, independently of this provision, — which was repealed by the 32 & 33 Vict. c. 83, s. 20, and not re-enacted by “The Bankruptcy Act, 1869,” — all costs incurred by the plaintiff, in any action brought in respect of a debt or liability provable under the bankruptcy, are released by the discharge of the bankrupt as incident to such debt or liability; even although there be no verdict or judgment until after the bankruptcy, so that the plaintiff could not prove for such costs. (*l*)

2. To detail the various demands for which a creditor may prove under a bankruptcy, would be to digress from the object of this treatise. But still the following summary, — showing, *first*, the law on this subject as it existed before the 32 & 33 Vict. c. 71 came into operation, (*m*) and as it must still be applied in all cases of bankruptcy which occurred under the statutes then in force; and *secondly*, the law as amended by that act, — may be worthy of notice.

Debts provable before the 32 & 33 Vict. c. 71. First, then, as to the law on this subject, as it existed at the time when the 32 & 33 Vict. c. 71, came into operation.

Under the 12 & 13 Vict. c. 106, s. 165, a creditor might prove, not only for a debt which accrued due to him before the act of bankruptcy, but also for any debt or demand really and *bonâ fide* contracted after the act of bankruptcy, and before the date of the adjudication, or the filing of a petition for adjudication in bankruptcy; provided the creditor had not, at the time the same was contracted, notice of any act of bankruptcy committed by the bankrupt. (*n*)

Again: under the 12 & 13 Vict. c. 106, s. 172, persons who had given credit to a bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever,

(*l*) *Simpson v. Mirabita*, L. R. 4 Q. B. 257; but see *Maughan v. Vinesberg*, L. R. 3 C. P. 318, *contra*.

(*m*) 1st January, 1870.

(*n*) The 12 & 13 Vict. c. 106, s. 133, protected all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat, and without notice of any prior act of bankruptcy. As to what dealings and transactions were protected by the analogous provision of the 2 & 3 Vict. c. 29, see *Young v. Hope*, 2 Exch. 105. As to what was held to constitute notice of an act of bankruptcy thereunder, see *Pennell v. Stephens*, 7 C. B. 987; S. C. 18 L. J. C. P. 291; *Pike v. Stephens*, 12 Q. B. 465; *Green v. Laurie*, 1 Exch. 335; *Hocking v. Acraman*, 12 M. & W. 170; *Bird v. Bass*, 6 M. & G. 143; *Ramsay v. Eaton*, 10 M. & W. 22.

which had not become payable when such bankrupt committed an act of bankruptcy; and whether such credit had been given upon any bill, bond, note, or other negotiable security, or not; might prove such debt or negotiable security, as if the same had been payable presently, and receive dividends equally with the other creditors, deducting a rebate of interest. (*n*¹)

So any person who, at the time of the adjudication, or filing a petition for adjudication in bankruptcy, was *surety*, or Proof by surety. liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, might, if he had paid the debt or any part thereof in discharge of the whole debt, although he might have paid the same after the issuing of the fiat or filing of the petition, if the creditor had proved his debt under the bankruptcy, stand in the place of such creditor as to the dividends, and other rights upon such proof; or if the creditor had not proved, might prove his demand in respect of such payment, as a debt under the bankruptcy, not disturbing the former dividends, and might receive dividends with the other creditors, although he might have become surety, bail, or liable as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety, or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed. (*o*)

Again: (*p*) if any bankrupt had, before the adjudication or the filing of such petition, contracted any debt, payable upon a *contingency* which had not happened before the adjudication or the filing of such petition, the person Debts payable on a contingency.

(*n*¹) It was held that, in order to be within this section, the money, &c., must be payable at a *certain* time. *South Staffordshire Railway Company v. Burnside*, 5 Exch. 129, 138. See Archb. Bk. L. 8th ed. 102.

(*o*) See 12 & 13 Vict. c. 106, s. 173. As to the debts which were held provable under the corresponding section (52) of 6 Geo. 4, c. 16, see *Earle v. Oliver*, 2 Exch. 71; *Wallis v. Swinburne*, 1 Exch. 203; *Jackson v. Magee*, 3 Q. B. 48; *Filbey v. Lawford*, 4 Scott N. R. 208; *S. C.* (in error), 3 M. & G. 479; *Abbot v. Hicks*, 7 Scott, 715; *Haigh v. Jackson*, 3 M. & W. 598; *Aflalo v. Fourdrinier*, 6 Bing. 306;

Clements v. Langley, 5 B. & Ad. 372; *Thompson v. Thompson*, 2 Scott, 266.

(*p*) See 12 & 13 Vict. c. 106, s. 177. In order to bring a case within the corresponding section (56) of 6 Geo. 4, c. 16, it was held that, at the time of the bankruptcy, the bankrupt must have contracted a *certain* debt payable afterwards on a contingency. *South Staffordshire Railway Company v. Burnside*, 5 Exch. 129; *Owen v. Routh*, 14 C. B. 327. And see further, as to this section, *Toppin v. Field*, 4 Q. B. 386. In *Ex parte Tindal*, 8 Bing. 402, J. S. covenanted to cause 4,000*l.* to be paid to his wife's trustees, within twelve months after his own decease, in trust to pay her

with whom such debt had been contracted might, if he thought fit, apply to the court to set a value upon such debt, and t' e court was required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value had not been ascertained before the contingency had happened, then such person might, after such contingency had happened, prove in respect of such debt, and receive a dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

So, if any trader who had become bankrupt, had contracted, before the filing of the petition, *a liability to pay money arising on a contingency.* upon a contingency which had not happened; and the demand in respect thereof had not been ascertained before the filing of such petition; in every such case, if such liability were not provable under any other provision of the act, the person with whom such liability had been contracted, was entitled to claim for such sum as the court should think fit; and, after the contingency had happened, and the demand in respect of such liability had been ascertained, he was entitled to prove such demand. (q)

Again: by the 24 & 25 Vict. c. 134, s. 150, it was enacted, that in all cases in which the bankrupt was *liable to pay any rent or other payment falling due at fixed or stated periods.* and the adjudication of bankruptcy should hap-

the interest for her life in case she survived him, and afterwards to pay the principal to their children; but if they had no children, to the survivor of them, J. S. and his wife, his or her executors or administrators; and it was held, that this was a debt on a contingency, provable under a commission against J. S. In this case the meaning of the 56th section was fully considered and explained by Tindal C. J. in delivering the opinion of himself, and of Lord Brougham C. and Mr. Justice Little-
dale.

(q) 12 & 13 Vict. c. 106, s. 178. This section did not apply to a liability to pay calls on shares in a registered joint stock company. *General Discount Company v. Stokes*, 17 C. B. N. S. 765. See further,

as to the effect of this section, *Temple v. Pullen*, 8 Exch. 389; *Maples v. Pepper*, 18 C. B. 177; *Boyd v. Robins*, 5 C. B. N. S. 597; *Atkins v. Farington*, 5 H. & N. 586. In *Warburg v. Tucker*, 5 E. & B. 384; S. C. (in error), E., B. & E. 914, it was held, that where a debt was secured by the deposit of a policy of insurance, and there was a covenant by the debtor to pay premiums, an action for not paying premiums which accrued after the bankrupt's discharge, was not barred by the above section. But it was also held, that the defendant might show, by way of equitable plea to such an action, that the plaintiff had elected to take the benefit of the petition in respect of the debt secured. *Elder v. Beaumont*, 8 E. & B. 353.

pen at any time other than one of such fixed or stated periods, it should be lawful for the person entitled to such rent or other payment to prove for a proportionate part thereof, up to the day of the adjudication of bankruptcy, in such manner as if the said rent or payment grew due from day to day, and not at such fixed or stated period as aforesaid. (r)

So, by s. 151: if any bankrupt had contracted, before the filing of a petition for adjudication, *any debt payable by way of instalments*, the creditor might prove for the amount of such instalments remaining unpaid at the time of such petition.

Debts payable by instalments.

So, by s. 153: if any bankrupt was, at the time of adjudication, *liable, by reason of any contract or promise, (s) to a demand in the nature of damages which had not been and could not be otherwise liquidated* or ascertained, the court acting in prosecution of such bankruptcy, might direct such damages to be assessed by a jury either before itself or in a court of law, and give all necessary directions for such purpose; and the amount of damage when assessed, was made provable as if it had been a debt due at the time of the bankruptcy; and if all necessary parties agreed, the court might assess such damages without the intervention of a jury, or a reference to a court of law. (t)

Liability to unliquidated damages on contract.

And by s. 154: if any bankrupt at the time of adjudication was liable by reason of any *contract or promise to pay premiums* upon any policy of insurance, *or any other sums of money, whether yearly or otherwise*, or to repay to or *indemnify any person against any such payment*, the person entitled to the benefit of such contract or promise might apply to the court to set a value upon his interest under

Liability on contract to pay premiums, &c., or to indemnify against such payment.

(r) This section was held to extend to cases which were not within the 12 & 13 Vict. c. 106, s. 172, or s. 178. See *Hopkins v. Thomas*, 7 C. B. N. S. 711.

(s) It was held, that this section applied only to *express* contracts, the damages for a breach of which had not been ascertained at the time of the bankruptcy; *Johnson v. Skafte*, L. Rep. 4 Q. B. 700; and, to bring a case within it, there must have been a breach of the contract before the time of adjudication. *Ex parte Mendel*, 33 L. J. Bank Ca. 14; *Ex parte Elmes*, Ib. 23.

(t) Formerly damages which were in their nature unliquidated, and which could be ascertained only by a jury, and had not been ascertained at the time of the bankruptcy, could not be proved under it, although the right to recover them was founded upon a contract. See *Green v. Bicknell*, 8 A. & E. 701; *Boorman v. Nash*, 9 B. & C. 145; *Parker v. Crole*, 5 Bing. 63; *Yallop v. Ebers*, 1 B. & Ad. 698; *Atwood v. Partridge*, 4 Bing. 209; *Toppin v. Field*, 4 Q. B. 386.

such contract or promise; and the court was thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon. (*u*)

Next: as to the law on this subject, as amended by the 32 & 33 Vict. c. 71.

Debts, &c.,
provable
under the 32
& 33 Vict. c.
71.

By s. 31 of that act it is enacted, —

1st. That demands in the nature of *unliquidated damages arising otherwise than by contract or promise*, shall not be provable in bankruptcy.

2dly. That no person having notice of any act of bankruptcy available for adjudication against the bankrupt, shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

3dly. That save as aforesaid, *all debts and liabilities present and future, certain or contingent*, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy, (*x*) by reason of any obligation incurred previously to that date, shall be deemed to be debts provable in bankruptcy.

And — after pointing out the mode in which the value of debts or liabilities which, *for any reason*, do not bear a certain value, is to be estimated for the purpose of proof — the section concludes by enacting —

That “liability” shall, for the purposes of the act, include any compensation for work or labor done, any obligation or possibility of an obligation, to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy; (*y*) and that, generally, it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money’s worth, whether such pay-

(*u*) This section was intended to apply to such cases as *Young v. Winter*, 16 C. B. 401; *Warburg v. Tucker*, 5 E. & B. 384; *S. C.* (in error), E., B. & E. 914; and *Ex parte Barwis*, 25 L. J. B. Ca. 10. See *Saunders v. Best*, 17 C. B. N. S. 731; but not to cases like *Parker v. Ince*, 4 H. & N. 53. See *Mudge v. Rowan*, L. Rep. 3 Ex.

85. And see further, *Martin’s Anchor Company v. Morton*, L. Rep. 3 Q. B. 306; *Hastie’s case*, L. Rep. 4 Ch. Ap. 274; *Brett v. Jackson*, L. Rep. 4 C. P. 259; *Cary v. Dawson*, L. Rep. 4 Q. B. 568.

(*x*) See sect. 47.

(*y*) *Ib.*

ment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; and as to the mode of valuation, whether it be capable of being ascertained by fixed rules, or be assessable only by a jury, or as matter of opinion.

This statute also (*z*) reënacts the 24 & 25 Vict. c. 134, s. 150, as to proof in case of rent or other periodical payments. (*a*)

And — apparently in substitution for the 12 & 13 Vict. c. 106, s. 182, as to proof by a creditor who had sued the bankrupt before his bankruptcy — it enacts, by s. 12, that when a debtor shall be adjudicated bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy, shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by the act; and further, (*b*) that the court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor, (*c*) in respect of any debt provable in bankruptcy; or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, or commenced during its continuance, to proceed on such terms as it may think just.

Lastly: an adjudication in bankruptcy, and an order of discharge obtained by the bankrupt in this country, may be pleaded by him in any British court, in any part of the world, in answer to any debt or demand provable under the bankruptcy, which is sought to be recovered in such court. Thus an English certificate in bankruptcy, has been held to be a good answer to a debt which arose in Calcutta, and was sued for in the supreme court there. (*d*) And so it has been held, that an order of discharge obtained in England, may be pleaded to an action brought in a Canadian court, to recover a debt contracted in Canada. (*e*)

Effect of order of discharge on debts, &c., contracted abroad.

(*z*) Sect. 35.

(*a*) *Ante*, 1298.

(*b*) Sect. 13.

(*c*) This has been held to apply only to proceedings against the debtor alone, and not to proceedings against him jointly with any other. *Ex parte Isaac*, L. R. 6 Ch. Ap. 58. And a distress for rent has

been held, not to be an "execution" or "legal process" within the meaning of this section. *Ex parte Birmingham &c. Gas Light Co.* L. R. 11 Eq. 615.

(*d*) *Edwards v. Ronald*, Knapp P. C. 259.

(*e*) *Ellis v. M'Henry*, L. R. 6 C. P. 228.

So a *foreign* bankruptcy and discharge may be pleaded in this country, to an action for the recovery of a debt contracted abroad, if the bankruptcy be, by the laws of the country wherein the debt was contracted, a discharge of such debt. (*f*)

But a discharge under a bankruptcy in a foreign country is not, in general, any bar to an action brought in our courts, for a debt contracted here with a subject of this country. (*g*)

There is, however, an exception where the discharge is granted in a foreign country, by virtue of an act of the imperial legislature of Great Britain. Thus it has been held, that a certificate of discharge granted to an insolvent by a court in Newfoundland, under the 49 Geo. 3, c. 27, discharges a debt contracted here, and may be pleaded in bar to an action in this country. (*h*) So a debt contracted in England, by a trader residing in Scotland, is barred by a discharge under a sequestration issued in conformity with the provisions of the Scotch bankrupt act, (*i*) in like manner as debts contracted in Scotland are thereby barred. (*k*) And so it is held,

(*f*) *Gardner v. Houghton*, 2 B. & S. 743; *Ballantine v. Golding, Co. Bank. Laws*; *Potter v. Brown*, 5 East, 124. See *Buck*, 63; *Eden*, 2d ed. 420. [A discharge, under the English bankrupt law, of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in Massachusetts, whether the creditor proved his debt under the English commission of bankruptcy or not. *May v. Breed*, 7 Cush. 15; *Shepherd v. Breed*, 7 Cush. 44. In these cases the whole subject was very thoroughly and amply discussed by the counsel, and by Shaw C. J. See *Verry v. McHenry*, 29 Maine, 206. This subject also underwent great consideration in *Marsh v. Putnam*, 3 Gray, 551, where it was held, that a discharge under the insolvent laws of Massachusetts is a bar to an action on a contract between two citizens of this state, though made and to be performed in another state.]

(*g*) *Bartley v. Hodges*, 1 B. & S. 375; 30 L. J. Q. B. 352; *Smith v. Buchanan*, 1 East, 6; *Lewis v. Owen*, 4 B. & Ald. 654; *Philpotts v. Reed*, 1 B. & B. 294;

Sidaway v. Hay, 3 B. & C. 12. [See *Story Confl. Laws*, § 337 *et seq.*, and cases cited; *Blanchard v. Russell*, 13 Mass. 1; *Pitkin v. Thompson*, 13 Pick. 64. A note was made by a citizen of Massachusetts, dated at Boston, payable to citizens of Maine, and indorsed by them to another citizen of Maine. The maker obtained a discharge under the insolvent laws of Massachusetts. This was held no bar to an action in Maine by the indorsee against the maker. *Palmer v. Goodwin*, 32 Maine, 535, 536. See *Savage v. Marsh*, 10 Met. 594; *Fiske v. Foster*, 10 Met. 597.]

(*h*) *Philpotts v. Reed*, 1 B. & B. 294. The courts at Westminster, however, will not discharge a defendant, on entering a common appearance, on the ground of his having become insolvent, and obtained his certificate at Newfoundland under the 49 Geo. 3, c. 27; but will leave him to plead it. *Philpotts v. Reed*, 1 B. & B. 13.

(*i*) 19 & 20 Vict. c. 79; s. 2 of which repeals 2 & 3 Vict. c. 41, and 54 Geo. 3, c. 137.

(*k*) *Sidaway v. Hay*, 3 B. & C. 12. Before the statute 6 & 7 Will. 4, c. 56, it was

that a certificate under the Irish bankrupt act (*l*) bars all the bankrupt's liabilities, both to his Irish and to his English creditors. (*m*)

3. By the 15 & 16 Vict. c. 76, s. 142, it is enacted that the bankruptcy of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, in the mode prescribed by that section. (*n*)

Bankruptcy of plaintiff, when pleadable.

But where the action is for a cause which accrued before the bankruptcy, it is not necessary for the party pleading the bankruptcy to show that the assignees have interfered. (*o*)

It was formerly held, that where the bankruptcy of the plaintiff could be set up as a defence, the plea must set forth all the proceedings in bankruptcy. (*p*) But it would seem that, since the 15 & 16 Vict. c. 76, ss. 50, 51, it would be sufficient to plead the plaintiff's bankruptcy generally.

How pleaded.

The bankruptcy of the plaintiff after declaration, must be pleaded *puis darrein continuance*. (*q*)

And, to a plea of the bankruptcy of the plaintiff, the defendant may reply matter which shows that he is suing merely as a trustee for third parties in whom the cause of action has become vested. (*r*)

Replication.

held that the discharge of an insolvent debtor upon a *cessio bonorum*, by the court of session in Scotland, did not bar an action in England, by an English creditor, to recover a debt contracted here. *Phillips v. Allan*, 8 B. & C. 477. But by the 6 & 7 Will. 4, c. 56, s. 16, a decree of *cessio bonorum* operates as an assignment of all the debtor's movables to the trustee therein named, for the benefit of creditors; and this being the case by virtue of the above statute, and not by the common law of Scotland, it would appear that, according to the principles stated and acted upon in *Sidaway v. Hay*, 3 B. & C. 12, the *cessio* might now be pleaded in bar to an action brought in England, for a debt contracted in this country. See, also, 19 & 20 Vict. c. 79, s. 102.

(*l*) 6 & 7 Will. 4, c. 14; and see, now, the 20 & 21 Vict. c. 60.

(*m*) *Ferguson v. Spencer*, 1 M. & G. 987.

(*n*) By the 19 & 20 Vict. c. 108, s. 62, it is enacted that the bankruptcy of any plaintiff in any action in a county court, which the assignees might maintain for the benefit of the creditors, shall not cause the action to abate, if the assignees shall elect to continue such action, and to give security for the costs thereof within such reasonable time as the judge shall order; and in case the assignees do not so elect, the defendant may avail himself of the bankruptcy, as a defence to the action.

(*o*) *Stanton v. Collier*, 3 E. & B. 274.

(*p*) *Pitt v. Chappelow*, 8 M. & W. 616.

(*q*) See *Dunn v. Hill*, 11 M. & W. 470.

(*r*) *Castelli v. Boddington*, 1 E. & B. 66; *Boddington v. Castelli* (in error), Ib. 879; *Parkham v. Hurst*, 8 M. & W. 743; *Dangerfield v. Thomas*, 9 A. & E. 292;

4. We have seen (*s*) that, under 32 & 33 Vict. c. 71, s. 49, the effect of the order of discharge is, to release the bankrupt from all *debts provable under the bankruptcy*, except as therein otherwise provided. And by the same section it is enacted, that “in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge, in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give that act and the special matter in evidence.” (*o*)

And the general plea of the defendant’s bankruptcy, may be pleaded to any action for the recovery of a debt or demand contracted before though not payable until after the act of bankruptcy; or of a debt *bonâ fidé* contracted and payable after the act of bankruptcy, but which is provable by virtue of the provisions before mentioned. (*p*)

But, if the order of discharge be obtained after the commencement of the action, although before plea, it will not be sufficient to rely upon the general plea given by the statute; but the defence must be pleaded specially, according to the fact. (*q*) And if the order of discharge be after plea, this must be pleaded *puis darrein continuance*. (*r*)

The plaintiff cannot reply specially, to a general plea of the defendant’s bankruptcy; but in such case he is merely to take issue thereon; and, under such issue, he may give in evidence any special matter, to show that the bankrupt’s discharge does not release him from the debt or liability in respect of which he is sued, either on the grounds mentioned in the act, (*s*) or on the ground that it was obtained by fraud. (*t*)

To support the plea of bankruptcy, the defendant has only to produce his order of discharge. (*u*)

and see *Smith v. Keating*, 6 C. B. 136; *Boyd v. Mangles*, 3 Exch. 387. fence was available under the general form of plea. *Harris v. James*, 9 East, 82.

(*s*) *Ante*, 1294, 1295.

(*r*) See *Todd v. Maxfield*, 6 B. & C.

(*o*) This section is, substantially, the same as the 24 & 25 Vict. c. 134, s. 161. 105.

(*p*) See per Cur. *Charlton v. King*, 4 T. R. 156. See, also, *Stedman v. Martinant*, 12 East, 664; *Westcott v. Hodges*, 5 B. & Ald. 12; *Attwood v. Partridge*, 4 Bing. 209.

(*s*) 32 & 33 Vict. c. 71, s. 49; and see 12 & 13 Vict. c. 106, s. 201; *Wilson v. Kemp*, 2 M. & S. 549; *Hughes v. Morley*, 1 B. & Ald. 22; *Ex parte Newman*, 2 G. & J. 329.

(*t*) *Horn v. Ion*, 4 B. & Ad. 78.

(*q*) *Jones v. Hill*, L. R. 5 Q. B. 230. Under the 5 Geo. 2, c. 30, s. 7, this de-

(*u*) 32 & 33 Vict. c. 71, ss. 49, 107; 24

And by the 32 & 33 Vict. c. 71, s. 49, the order of discharge is made sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon. (*x*)

Where one of several persons who were joint debtors, is discharged from liability by his bankruptcy, the creditor need not now sue him with the other parties; and if the non-joinder be pleaded in abatement, the bankruptcy and order of discharge may be replied. (*y*)

Non-joinder
of bankrupt
co-contractor.

5. The defendant may also plead his discharge under a liquidation by arrangement, pursuant to the 32 & 33 Vict. c. 71, s. 125, which enacts, (*z*) that a "certificate of such discharge, given by the registrar, shall have the same effect as an order of discharge given to a bankrupt under that act;" or he may plead, that his creditors had resolved, in the manner prescribed by sect. 126 of the above act, that a composition should be accepted in satisfaction of the debts due to them from him.

Liquidation
by arrange-
ment;

or composi-
tion, under
32 & 33 Vict.
c. 71, ss. 125,
126.

But, by the same section, the provisions of such a composition are made binding, only on those creditors whose names and addresses, and the amount of the debts due to whom, were shown in the statement of the debtor, produced to the meeting at which the resolution accepting the composition was passed.

And, by the 32 & 33 Vict. c. 62, s. 15, it is enacted, that where a debtor makes any arrangement or composition with his creditors under the provisions of the above act, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof, before the date of the arrangement or composition, he obtained forbearance by any fraud; provided the defrauded creditor has not assented to the arrangement or composition, otherwise than by proving his debt and accepting dividends.

Invalid,
when debt
incurred by
fraud.

6. The defendant may also plead his discharge, by virtue of a *deed of arrangement* made in pursuance of the 24 & 25 Vict. c. 134, ss. 192-200, (*a*) provided such deed was made before the 32 & 33 Vict. c. 71, came into operation.

Release by
deed of ar-
rangement.

& 25 Vict. c. 134, s. 161; *Taylor v. Welsford*, Moo. & M. 503.

(*y*) 3 & 4 Will. 4, c. 42, s. 9.

(*z*) Sub-sect. 10.

(*x*) See, also, 24 & 25 Vict. c. 134, s. 161, and *Fyson v. Chambers*, 9 M. & W. 460.

(*a*) And see — as to deeds made on or

But a deed purporting to be made in pursuance of those sections is invalid, unless it be so framed as to be *for the benefit of, and to bind all the bankrupt's creditors.* (b)

Must include
all the cred-
itors.

1st. Accordingly such a deed is not valid, if it expressly or impliedly exclude from its benefits non-executing creditors; (c) or all creditors who do not execute it within a given time. (d) And so, a deed made by one member of a firm, for the benefit of his separate creditors only; (d¹) or a deed made between the members of firm and their joint creditors only, is bad. (e)

But where a deed of composition was made between A., the debtor, of the one part, "and the undersigned creditors of A.," of the other part, such creditors "being a majority in number representing three fourths in value of the creditors of A., whose debts amounted to 10*l.* and upwards;" this was held to be a good deed within the statute. (f)

So, a deed which is expressed to be made between the debtor and "all his creditors," will be good; because each of the creditors, although not expressly named in such deed, could maintain an action thereon. (g) And although there be no covenant in the deed, on which the non-assenting creditors can sue in their own names; still, if they can sue thereon in the name of a trustee for them, that will render the deed valid. (h)

2d. Such a deed will not bind a non-assenting creditor if it contain unreasonable covenants, *i. e.* covenants which bear unequally

after the 11th October, 1868 — the 31 & 32 Vict. c. 104, s. 1.

(b) *Ex parte* Rawlings, 1 New Reports, 149. But a deed which is invalid under the statute, may still operate as a conveyance of the property comprised therein. *Johnson v. Osenton*, L. R. 4 Ex. 107.

(c) *Ilderton v. Castrique*, 14 C. B. N. S. 99; *S. C.* (in Cam. Scac.), 16 Ib. 142; *Ex parte* Cockburn, 33 L. J. Bank. C. 17; *Chesterfield &c. Colliery Co. v. Hawkins*, 3 H. & C. 677; *Benham v. Broadhurst* (in Cam. Scac.), 3 H. & C. 472; *Martin v. Gribble*, Ib. 631.

(d) *Dewhurst v. Kershaw*, 1 H. & C. 726; *Berridge v. Abbott*, 13 C. B. N. S. 507; *Copeman v. Hart*, 14 Ib. 91.

(d¹) *Ex parte* Glen, L. R. 2 Ch. Ap. 670.

(e) *Tomlin v. Dutton*, L. R. 3 Q. B. 466; and see *Rixon v. Emary*, L. R. 3 C. P. 546.

(f) *Clapham v. Atkinson*, 4 B. & S. 722; and see *McLaren v. Baxter*, L. R. 2 C. P. 559; *Isaacs v. Green*, L. R. 2 Ex. 352; *Hodgson v. Wightman*, 1 H. & C. 810.

(g) *Gresty v. Gibson*, L. R. 1 Ex. 112; *Reeves v. Watts*, L. R. 1 Q. B. 412. As to the case of *Gurrie v. Kopera*, 3 H. & C. 694, *quære*.

(h) *Scott v. Berry*, 3 H. & C. 966; and see *Sowry v. Law*, L. R. 3 Q. B. 281.

on the different classes of creditors. (*i*) And such covenants cannot be rejected, in order to give validity to the deed. (*j*)

Must not contain unreasonable covenants.

Nor will a deed be good where it contains provisions, which go beyond the powers conferred by the act for the management and winding-up of the debtor's estate. *E. g.* where a deed empowered trustees to carry on the debtor's business, and contained a covenant to indemnify the trustees, under which the creditors might have incurred a liability over and above the loss of their debts; it was held to be *ultra vires* and bad. (*k*)

But it is not the duty of the court, to judge merely of the reasonableness of the bargain between the debtor and his creditors. (*l*)

3d. If it appear that the power given by the statute to the assenting majority of the creditors, to bind the non-assenting minority by a deed made pursuant to its provisions, has not been exercised *bonâ fide* for the benefit of the creditors, but solely with a view to release the debtor, such deed will be invalid. (*m*)

Must be made *bonâ fide*.

4th. Such a deed, to be pleadable in bar to an action by a non-assenting creditor, must either contain a release, (*n*) or a covenant to execute a release on payment of the agreed composition. (*o*)

Must contain release, or covenant to release,

(*i*) Per Lord Cairns L. J. *Ex parte* King, L. R. 3 Ch. Ap. 10, 13; and see per Erle C. J. *Leigh v. Pendlebury*, 15 C. B. N. S. 815, 830. As illustrations of this rule, the reader is referred to the following cases: *Bissell v. Jones*, 4 Q. B. 49; *Bailey v. Bowen*, L. R. 3 Q. B. 133; *Woods v. Foote*, 1 H. & C. 841; *Dell v. King*, 2 Ib. 84; *Balden v. Pell*, 5 B. & S. 213; *Hidson v. Barclay*, 3 H. & C. 9; (in Cam. Scac.), Ib. 361; *Strick v. De Mattos*, Ib. 22; (in Cam. Scac.), L. R. 1 Ex. 91; *Walker v. Neville*, 3 H. & C. 403; *Hernulewicz v. Jay*, 34 L. J. Q. B. 201; *Lyne v. Watts*, 18 C. B. N. S. 593; *Boulnois v. Mann*, L. R. 1 Ex. 28; *Johnson v. Barratt*, Ib. 65; *Keyes v. Elkins*, 5 B. & S. 240; *Coles v. Turner* (in Cam. Scac.), L. R. 1 C. P. 373, reversing the judgment of the C. P. in S. C. 18 C. B. N. S. 735; *Giddings v. Penning*, L. R. 1 Ex. 325.

(*j*) *Dell v. King*, 2 H. & C. 84. Even where it can be shown, *aliunde*, that they

could not prejudice the plaintiff. *Oldis v. Armston*, L. R. 2 Ex. 406.

(*k*) *Wigfield v. Nicholson*, L. R. 3 Q. B. 450.

(*l*) Per Lord Cairns L. J. *Ex parte* King, L. R. 3 Ch. Ap. 10, 13; *Bailey v. Bowen*, L. R. 3 Q. B. 133.

(*m*) *Ex parte* Cowen, L. R. 2 Ch. Ap. 563; *Hart v. Smith*, L. R. 4 Q. B. 61.

(*n*) *Ipstones Park & Co. v. Patkinson*, 2 H. & C. 828; *Clarke v. Williams*, 3 Ib. 508; (in Cam. Scac.), Ib. 1001; *Kilby v. Wright*, 18 C. B. N. S. 272.

(*o*) *Semle*, see *Clapham v. Atkinson*, 4 B. & S. 722. And a deed in the form given in sched. D. of the 24 & 25 Vict. c. 134, is not pleadable in bar to an action, even by a creditor who has assented thereto; *Egre v. Archer*, 16 C. B. N. S. 638; *Jones v. Morris*, 34 L. J. Q. B. 90; nor can it be pleaded by way of equitable defence. *Wright v. Jelly*, L. R. 4 Ex. 9.

But if the composition money has been tendered to a non-assenting creditor, and the deed be otherwise good, it may be pleaded in bar to an action by him, although it do not contain a release. (*p*)

So the deed will be good, if it contain a general covenant by the creditors not to sue the debtor, except in so far as may or not to sue. be necessary for the purpose of enforcing remedies against third parties. (*q*)

But a mere letter of license is not a deed within the statute. (*r*) Nor, if the deed merely contain a covenant not to sue for a limited time, is it pleadable in bar thereunder. (*s*) But if, in such a deed, there be an express provision that, during such limited time the deed may be pleaded in bar, that will make it good. (*t*)

5th. Nor does it appear to be a good objection to such a deed, that it does not contain a covenant by the debtor, to pay the composition mentioned therein; (*u*) nor any reservation of creditors' rights against sureties. (*x*)

6th. The assent of a creditor to the deed, as required by the statute, must be unconditional, (*y*) and must be given before the deed is registered. (*z*) And it may be given before the deed is executed, or prepared; provided the deed, when prepared, substantially corresponds with the terms specified in the assent. (*a*)

7th. And a deed which is valid under the statute, bars the claims of all persons who could have proved against the debtor's estate in bankruptcy. (*b*) But such a deed is no bar to an action brought by a non-assenting creditor, to recover unliquidated damages, unless such damages have been assessed under the 24 & 25 Vict. c. 134, s. 153. (*c*)

Nor can such a deed be pleaded in bar by a joint debtor, to an action by a non-assenting creditor. (*d*)

(*p*) *Garrod v. Simpson*, 3 H. & C. 395.

(*q*) *Hitson v. Barclay* (in Cam. Scac.), 3 H. & C. 361, 369.

(*r*) *Latham v. Lafone*, L. Rep. 2 Ex. 115.

(*s*) *Ray v. Jones*, 19 C. B. N. S. 416.

(*t*) *Walker v. Nevill*, 3 H. & C. 403.

(*u*) *Per Channell B.* delivering the judgment of the court, in *Garrod v. Simpson*, 3 H. & C. 305, 401.

(*x*) *Poole v. Willatts*, L. Rep. 4 Q. B. 630.

(*y*) *Johnson v. Osenton*, L. Rep. 4 Ex. 107.

(*z*) *Beddall v. King*, L. Rep. 4 C. P. 549.

(*a*) *Rutty v. Benthall*, L. Rep. 2 C. P.

488; *Waddington v. Roberts*, L. Rep. 3 Q. B. 579.

(*b*) *Wood v. De Mattos* (in Cam. Scac.), L. Rep. 1 Ex. 91, overruling *Mare v. Underhill*, 4 B. & S. 566; and see *Hooper v. Marshall*, L. Rep. 5 C. P. 4.

(*c*) *Hoggarth v. Taylor*, L. Rep. 2 Ex. 105; *Sharland v. Spence*, L. Rep. 2 C. P. 456; *Robertson v. Goss*, L. Rep. 2 Ex. 396.

(*d*) *Andrew v. Macklin*, 6 B. & S. 201; 34 L. J. Q. B. 89.

11. *Equitable Defences.*

1. By the 17 & 18 Vict. c. 125, s. 83, it is enacted, that it shall be lawful for the defendant, or plaintiff in replevin, in any cause in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence; and the said courts are thereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words, "for defence on equitable grounds," or words to the like effect.

Section 84 enacts, that any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querelâ*.

Section 85 enacts, that the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect.

And by s. 86, it is provided, that in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law, so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out on such terms, as to costs and otherwise, as to such court or judge may seem reasonable.

2. In exercising the powers conferred on the courts of common law by the above enactments, it has been held, first: that it is entirely in the discretion of the courts to allow equitable matter to be pleaded or not; and, secondly, that they will not allow such matter to be pleaded unless it appear clearly, or at least with reasonable certainty, what the equity is on which the party relies, and that the facts are such as will support such equity. In such cases, moreover, the court may direct that the issue raised on an equitable plea or answer, shall be tried by a judge, instead of by a jury. (e)

Cases in which equitable defences will be allowed.

(e) *Luce v. Izod*, 1 H. & N. 245; *Hunter v. Gibbons*, Ib. 459; and cases cited *infra*.

And although it is optional on the part of the defendant to plead an equitable plea, or to apply to a court of equity for relief; (*f*) still, if he resort, in the first instance, to a court of equity, he will not be allowed to plead an equitable pleading, at law, on the same grounds. (*g*) And so it has been held, that if the defendant exercise his option, by pleading an equitable defence at law, he cannot afterwards come to a court of equity for relief on the same grounds. (*h*) But this rule applies only where the case is of such a nature, and the form of the pleading at law is such, that the court of law can and will give such relief on the equitable plea, as a court of equity would give. (*i*)

3. As to what is an equitable defence or answer within the act, it is now held by all the courts, that such a defence or answer can be pleaded only where, if judgment were obtained against the party pleading it, the facts would entitle that party to an absolute and perpetual injunction against such judgment. (*k*)

The following cases will serve to illustrate this proposition.

To an action on a lease for the non-payment of rent, the defendant proposed to plead, by way of equitable defence, a parol agreement to surrender the lease, and performance of such agreement on his part. But the court of exchequer refused to allow the plea, on the ground that, in such a case, a court of equity would only give relief on terms, *e. g.* upon the terms of requiring the defendant to execute a valid surrender. (*m*)

So, in an action on a bond—conditioned to indemnify the obligees against the defaults of one C., in performing certain covenants; viz. to pay a sum of money, and to keep on foot certain securities,—the defendant pleaded, for a defence on equitable grounds, that he executed the bond as surety for C., and that he

(*f*) *Kingsford v. Swinford*, 28 L. J. C. 413; *Gompertz v. Pooley*, *Ib.* 484.

(*g*) *Schlumberger v. Lister*, 2 E. & E. 855; 29 L. J. Q. B. 157.

(*h*) *Wild v. Hillas*, 28 L. J. C. 170.

(*i*) *Per Kindersley V. C. Waterlow v. Bacon*, L. R. 2 Eq. 514, 519.

(*k*) *Mines Royal Societies v. Magnay*, 10 Exch. 489; *Wodehouse v. Farebrother*, 5 E. & B. 277; *Wood v. Copper Miners Company*, 17 C. B. 561; *Teede v. Johnson*, 11 Exch. 840; *Clerk v. Laurie*, 1 H. & N. 458; *Stimson v. Hall*, 1 H. & N. 831; *Gee v. Smart*, 8 E. & B. 313.

(*m*) *Mines Royal Societies v. Magnay*, 10 Exch. 489; and see *Gorely v. Gorely*, 1 H. & N. 144; *Marcon v. Bloxam*, 11 Exch. 586.

had offered and was still ready to pay all that was in equity due to the obligees, on receiving an assignment of the securities. And this plea was held bad, on the ground that the court had not the power to give relief to the defendant, on condition of his afterwards paying what was due on the bond. (*n*)

Nor is it a good ground of equitable defence, that the action is brought in respect of matters as to which a suit in equity is pending; for this would not give a court of equity the right, unconditionally, to stop the action. (*o*)

And it is said that, in general, an equitable pleading cannot be allowed, unless its effect will be to put an end to the dispute between the parties. (*p*)

But in *detinue* for a lease, the defendant was allowed to plead by way of equitable defence: that the lease was deposited by way of equitable mortgage, to secure payment to the defendant of a sum of money; that the sum in question was still due; that, after action brought, he tendered and offered to deliver up the lease to the plaintiff on payment of the said sum, and also tendered and offered to pay the plaintiff his costs of the action up to that time; and that such tender and offer were refused. (*q*)

And the same principle has been adopted, in cases where the party relies on mistake or accident, as the ground of his equitable defence or answer; the rule established by the authorities being, that where the contract is executed, and a court of equity would give unconditional relief, the mistake may be pleaded in an action on the contract, as a defence or answer on equitable grounds; but that where the contract is executory, and a court of equity would only grant relief upon terms, *e. g.* that the contract should be reformed, it cannot be so pleaded. (*r*)

4. With reference to replications on equitable grounds, the general rule is: that such a replication will be allowed, only where it would be inequitable to permit the defendant to set up the particular defence relied on, in answer to a

(*n*) *Wodehouse v. Farebrother*, 5 E. & B. 277.

(*o*) See *Phelps v. Prothero*, 16 C. B. 370.

(*p*) Per Pollock L. C. B. *Gulliver v. Gulliver*, 1 H. & N. 174, 177.

(*q*) *Chilton v. Carrington*, 16 C. B. 206.

(*r*) *Borrowman v. Rossel*, 16 C. B. N. S. 58; *Steele v. Haddock*, 10 Exch. 643; *Perez v. Oleaga*, 11 Exch. 506; *Burgoyne v. Cottrell*, 24 L. J. Q. B. 28; *Drain v. Harvey*, 17 C. B. 257; *Luce v. Izod*, 1 H. & N. 245; *Vorley v. Barrett*, 1 C. B. N. S. 225; *Scott v. Littledale*, 8 E. & B. 815.

legal claim ; but not where, upon the declaration plea and replication taken together, it appears that the plaintiff has no legal claim, although he may, under the circumstances, be entitled to relief in equity. (s) Accordingly it has been held to be a good replication, on equitable grounds, to a plea of release, that the plaintiff on the record is only the nominal plaintiff, having no interest in the subject-matter of the action ; and that he executed the release without the authority or consent of the real plaintiff therein. (t) So where the defendant pleaded, that he satisfied the plaintiff's claim, by paying to him divers moneys, and executing and delivering to him divers deeds and securities for money ; and the plaintiff replied, on equitable grounds, that the said deeds and securities were accepted by him on the faith of a representation by the defendant, that they were valid deeds and securities, whereas they were, to the defendant's knowledge, void, this was held to be a good replication. (u)

So where, in an action on a policy of insurance, the defendants pleaded, that the policy was effected on the express condition, that if any statement in the proposal was untrue, the policy should be void ; and that a particular statement was untrue ; and the plaintiff replied, on equitable grounds, that the prospectus of the company contained a representation, that all policies accepted by them should be indisputable, except in cases of fraud ; that the plaintiff executed the policy on the faith of such representation ; and that the untrue statement mentioned in the plea was not fraudulent ; this was held to be a good replication. (x)

So, in an action by the husband for money had and received, the defendant may plead, on equitable grounds, that the money was money bequeathed to the separate use of the wife ; and that she had made an equitable assignment of the same, upon trusts in which the husband took no interest ; and the plaintiff may reply, on equitable grounds, a prior assignment to himself. (y)

Lastly, we may remark, that the object of giving an equitable jurisdiction to the courts of law, was not to interfere in any way

(s) *Bartlett v. Wells*, 1 B. & S. 836 ; 31 L. J. Q. B. 57 ; *Reis v. Scottish Equitable Assurance Company*, 2 H. & N. 19 ; *Thames Iron Works &c. Company v. Royal Mail S. P. Company*, 13 C. B. N. S. 358 ; 31 L. J. C. P. 169.

(t) *De Pothonier v. De Mattos*, E., B. & E. 461.

(u) *Stears v. South Essex Gas Light Company*, 9 C. B. N. S. 180.

(x) *Wood v. Dwaris*, 11 Exch. 493.

(y) *Sloper v. Cottrell*, 6 E. & B. 497 ; and see *Clerk v. Laurie*, 1 H. & N. 458.

with the court of chancery. (z) And, accordingly, that court may still entertain a suit and restrain proceedings at law, and will do so, even after equitable pleadings at law, in cases where such court considers that complete justice cannot be done at law. (a) But where complete justice can be done at law, a court of equity will not generally interfere. (b)

Equitable jurisdiction of courts of law not intended to interfere with court of chancery.

(z) Per Maule J. *Phelps v. Prothero*, 16 C. B. 370, 398.

(b) *Welchman v. Farebrother*, 2 Jur. N. S. 126.

(a) *Evans v. Bremridge*, 2 Jur. N. S. 134; and *Ib.* 311.

CHAPTER VI.

OF THE DAMAGES RECOVERABLE IN AN ACTION ON CONTRACT; AND HEREIN OF A PENALTY AND LIQUIDATED DAMAGES.

1. Penalty and Liquidated Damages.

WHERE the parties to a contract mutually agree that, in the event of a breach of its provisions, the one shall pay to the other a specified sum of money, it not unfrequently becomes a question of some difficulty, whether such sum is to be considered as in the nature of a *penalty*, — that is, merely as a sum intended to cover any damage which may be *actually incurred* by a breach of the contract; or as *liquidated damages*, — that is, as the sum *to be paid*, in that event, *without reference to the extent of the injury* sustained. And, accordingly, we now propose to review such of the decisions on this subject, as furnish rules by which the intention of the parties in these cases may be ascertained; premising, however, that the courts have, generally, shown an inclination to treat a sum reserved in the manner above mentioned, rather as a penalty than as liquidated damages. (*a*)

1. It has been said to be very difficult to lay down any general principle in cases of this kind; but in *Astley v. Weldon* the rule was stated thus, viz. that where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty; but that where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as

(*a*) [See *Bagley v. Peddie*, 5 Sandf. 192. The question stated in the text, subject to the rules hereafter laid down with special reference to this topic, is one of intention of the parties, and this is to be

gathered from their language, the subject-matter of their agreement, and their situation, according to the rules of construction which have been heretofore noticed. See *Perkins v. Lyman*, 11 Mass. 76.]

liquidated damages. (a¹) In that case it appeared, that the parties had entered into an agreement, by which the defendant engaged to perform at the plaintiff's theatres for a term of years; that the plaintiff agreed to pay a weekly salary, and the defendant's travelling expenses; that the defendant agreed to attend rehearsals, and to pay such fines as should be inflicted for non-observance of the regulations of the theatres, &c.; "and, lastly, it was thereby agreed between the parties, that either of them neglecting to perform that agreement according to the tenor and effect, and true intent and meaning thereof, should pay to the other of them the full sum of 200*l.* of lawful money of Great Britain, to be recovered in any of his majesty's courts of record at Westminster." And the court held, that the sum mentioned in the agreement was in the nature of a penalty, and was not liquidated damages.

Astley v. Weldon.

And the case of *Kemble v. Farren*, (b) which is the leading case on this subject, was as follows: By an agreement between the plaintiff and defendant, the defendant engaged to act as principal comedian at Covent Garden Theatre for four seasons, commencing with October, 1828; and in all things to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.*, every night on which the theatre should be open for theatrical performances during the ensuing four seasons; and that defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be *liquidated and ascertained damages, and not a penalty or penal sum*, or in the nature thereof. The breach alleged was, that the defendant refused to act during the second season; and, at the trial, the jury gave a verdict for the plaintiff for 750*l.* damages, subject to a motion for increasing them to 1,000*l.*, if the court

Kemble v. Farren.

(a¹) Per Heath J. *Astley v. Weldon*, 2 B. & P. 346, 353. The distinction is between a sum payable on one event, and a sum intended to secure the performance of several matters. See per Cur. Sparrow

v. Paris, 7 H. & N. 594, 599; 1 Pothier by Evans, 90; 2 Ib. 81.

(b) 6 Bing. 141; and see *Davies v. Panton*, 6 B. & C. 216; *Reilly v. Jones*, 1 Bing. 302; *Barton v. Glover*, Holt N. P. C. 43.

should be of opinion that, upon this agreement, the plaintiff was entitled to the whole sum claimed, as liquidated damages. The court decided that the verdict should stand, and the rule for increasing the damages be discharged; and Tindal C. J. in delivering judgment, said: "It is, undoubtedly, difficult to suppose any words more precise and explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1,000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1,000*l.*; for we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and, in all cases, it saves the expense and difficulty of bringing witnesses to that point. But, in the present case, the claim is not so confined; it extends to the breach of *any* stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day; or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1,000*l.* But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only, which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot therefore distinguish this case, in principle, from that of *Astley v. Weldon*. . . . As this case

appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it ; and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it." (b¹)

The above is still regarded as being a correct exposition of the law on this subject ; (c) and the settled rule with reference thereto would now appear to be: that the courts will hold that the words "liquidated damages" are not to be taken according to their obvious meaning, in any case where the doing or omitting to do several things of various degrees of importance is secured by the sum named ; and where, notwithstanding the language used, it is plain from the whole instrument that the real intention was different. (d)

Rule deducible therefrom.

And so it is said, that if a party agree to pay a specific sum on several events, all of which are capable of accurate valuation, it must be construed as a penalty, and not as liquidated damages. (e)

2. But if the agreement provide, that a certain sum shall be paid in the event of the performance or non-performance of a *particular specified act*, with regard to which, in case of default, *damages* in their nature *uncertain* may arise ; and there be no words evincing an intention that the sum reserved shall be viewed as a penalty only, such sum may be recovered as liquidated damages. (e¹)

What are liquidated damages.

(b¹) [See *Williams v. Dakin*, 17 Wend. 447, 455 ; *S. C.* 22 Wend. 201 ; *Heard v. Bowers*, 23 Pick. 455 ; *Shaw C. J.* in *Shute v. Taylor*, 5 Met. 61, 67 ; *Bright v. Rowland*, 3 How. (Miss.) 398, 413.]

(c) Per Parke B. *Galsworthy v. Strutt*, 1 Exch. 659, 665.

(d) Per Cur. Price v. Green (in error), 16 M. & W. 346, 354 ; and see *Reynolds v. Bridge*, 6 E. & B. 528 ; *Betts v. Burch*, 4 H. & N. 506 ; *Horner v. Flintoff*, 9 M. & W. 678 ; *Beckham v. Drake*, 3 M. & W. 846 ; *Boys v. Ancell*, 7 Scott, 364 ; [*Hoag v. McGinnis*, 22 Wend. 163. In cases of doubt courts will construe the amount reserved as in the nature of a penalty, rather than as stipulated damages, though the sum reserved be called liquidated damages in the bond. *Shaw C. J.* in *Shute v. Taylor*, 5 Met. 61, 67 ; *Bagley v. Peddie*,

5 Sandf. 192 ; *Tayloe v. Sandiford*, 7 Wheat. 13 ; *Baird v. Folliver*, 6 Humph. 186 ; *Hodges v. King*, 7 Met. 583, 588 ; *Chiddick v. Marsh*, 1 N. Jer. 463, 465 ; *Beale v. Hayes*, 5 Sandf. 640.]

(e) Per Parke B. *Atkins v. Kinnier*, 4 Exch. 776, 783.

(e¹) [*Chamberlain v. Bayley*, 11 N. H. 234, 240 ; *Brewster v. Edgerly*, 13 N. H. 275 ; *Beale v. Hayes*, 5 Sandf. 640 ; *Smith v. Smith*, 4 Wend. 468 ; *Knapp v. Maltby*, 13 Wend. 587 ; *Gammon v. Howe*, 14 Maine, 250 ; *Lingley v. Cutler*, 7 Conn. 291 ; *Mott v. Mott*, 11 Barb. 127. Where the plaintiffs gave \$3,000 for the *patronage and good-will* of a newspaper establishment, and \$500 for the type and printing apparatus, and the defendants (the vendors) covenanted that they would not publish, or aid or assist in the publishing of a rival

Thus, if a sum named in respect of the non-performance of one covenant only, be expressly declared to be reserved as liquidated damages, and not as a penalty, the court will hold it to be the former. (*f*) So, in *Lowe v. Peers*, (*g*) the defendant gave to the plaintiff the following memorandum: "I do hereby promise Mrs. Catherine Lowe that I will not marry with any other person beside herself: if I do, I agree to pay the said Catherine Lowe 1,000*l.*, within three months next after I shall marry anybody else;" and it was held, that the sum specified formed the sole measure of damages, as fixed and liquidated between the parties by their express agreement.

So, in cases between landlord and tenant, where a sum is reserved annually, for any specific act of mismanagement of the land, it seems that it may be regarded as liquidated damages, although it be termed a *penalty*. (*h*) Thus, in *Birch v. Stephenson*, (*i*) "5*l.* per acre" were reserved in a lease, "for every acre of meadow land which the lessee should plough up;" and it was contended, that this reservation was in the nature of a penalty, against which the tenant might be relieved. But Sir J. Mansfield C. J. said: "You must enforce that argument in a court of equity; it cannot be listened to in a court of law; but a very great authority in a court of equity has said, that a reservation of 100*l.* per acre for ploughing pasture land is not a penalty." (*k*) So, in a subsequent

paper, and fixed the measure of damages at \$3,000, the case, from its peculiar nature, and the total uncertainty of arriving at a correct conclusion as to the amount of damages, was held to be a fit and proper one for the application of the rule, that the sum agreed upon should be regarded as *stipulated damages*, and not as a penalty. *Dakin v. Williams*, 17 Wend. 447; *Williams v. Dakin*, 22 Wend. 201. Where a purchaser of fourteen city lots covenanted, in consideration of having the property conveyed to him for only \$21,000, that he would, by a certain day, erect on the lots two brick houses of specified dimensions, or in default thereof pay to the grantor, on demand, the sum of \$4,000; held, that the sum specified was not a penalty, but should be deemed part of the contract price of the lots, and that on failure to erect the houses, the *covenantee* was entitled to recover the specified sum as *liqui-*

dated damages, and could not be limited merely to *actual damages*, sustained in consequence of the non-erection of the buildings. *Pearson v. Williams*, 26 Wend. 630. See *Legh v. Lillie*, 6 H. & N. 165, 171; *Hurst v. Hurst*, 4 Exch. 571.]

(*f*) *Price v. Green*, 16 M. & W. 346; S. C. 13 M. & W. 695; *Rawlinson v. Clarke*, 14 M. & W. 187.

(*g*) 4 Burr. 2225.

(*h*) *Rolfe v. Peterson*, 2 Bro. P. C. Toml. ed. 436; and see per Cur. *Jones v. Green*, 3 Y. & J. 304.

(*i*) 3 Taunt. 469.

(*k*) And see per Lord Mansfield C. J. *Lowe v. Peers*, 4 Burr. 2225, 2228; and per Parke B., citing this case, *Galsworthy v. Strutt*, 1 Exch. 659, 663. See further, on this subject, *Fuller v. Fenwick*, 3 C. B. 705, 712, 713; *Bringloe v. Goodson*, 8 Scott, 71.

case, (*l*) the court of king's bench held, that a reservation of "50*l*. per acre for every acre converted into tillage," is in the nature of liquidated damages. And where a lessee covenanted that he would not, in the last three years of the term, sow more than seventy acres of clover in one year, "or, if he did so, would pay an additional rent of 10*l*. for every acre above seventy acres, for the residue of the term, in the same manner and at the same times as the annual rent before reserved;" it was held, in equity, that the additional rent was in the nature of liquidated damages, and not of a penalty; and therefore, on a bill filed by the landlord for a discovery of breaches, a plea, that the discovery might subject the tenant to penalties, was overruled. (*m*)

So, in *Fletcher v. Dyche*, (*n*) where two persons agreed to perform certain work in a limited time, or to pay a stipulated sum, weekly, for such time afterwards as it should remain unfinished; the court held, that such weekly payments were not by way of penalty, but in the nature of liquidated damages.

So, where the agreement was, that in consideration that the plaintiff, who was a surgeon, would engage the defendant as his assistant, the defendant promised not to practise at any time at M., or within seven miles thereof, under a penalty of 500*l*.; it was held that, under this agreement the 500*l*., although called a penalty, was recoverable as liquidated damages. (*o*) And where a party who had sold a public-house, agreed not to carry on the business of a licensed victualler within a certain distance, "under the penal sum of 500*l*., the same to be recovered as and for *liquidated damages*;" Best C. J. held that the plaintiff was entitled to a verdict for that sum, although he gave no evidence of actual damage. (*p*)

And even where the contract contains several conditions, yet, if it be stipulated that, on non-performance of any one of them, a sum of money shall be paid as liquidated damages, and not by way of penalty; and the conditions are such, that the damage arising from the violation of any one of them cannot be exactly estimated

(*l*) *Farrant v. Olmius*, 3 B. & Ald. 692.

(*m*) *Jones v. Green*, 3 Y. & J. 298.

(*n*) 2 T. R. 32.

(*o*) *Sainter v. Ferguson*, 7 C. B. 716;

18 L. J. C. P. 217. But see *Smith v. Dickenson*, 3 B. & P. 630; *Davies v. Penton*, 6 B. & C. 216, 222. As to the effect

of a clause in a bond, that interest should run from the date of a bill of exchange, by way of penalty, see *Orr v. Churchill*, 1 H. Bl. 227.

(*p*) *Crisdee v. Bolton*, 3 C. & P. 240; and see, per Abbott C. J. *Davies v. Penton*, 6 B. & C. 216, 222.

beforehand ; such sum will be held to be recoverable as liquidated damages, on breach of any of the said conditions. (*g*)

So, where the condition of a bond stipulated, that if the defendant should do any one of certain specified acts, then, and in any or either of the said cases, if the defendant did and should forthwith pay to the plaintiff the sum of 300*l.*, the bond should be void ; it was held that, on the doing by the defendant of any one of the acts in question, the plaintiff was entitled to recover on the bond the 300*l.* as liquidated damages. (*r*)

So it has been said, that it is even competent for parties to stipulate to pay a certain sum, on non-performance of a contract to pay a smaller sum ; and that if they do this in express terms, the court must give effect to their contract. (*s*)

And so, even in the case of a contract of indemnity, the parties may agree, beforehand, in estimating the amount to be recovered thereunder by way of liquidated damages. (*t*)

And it seems that where a certain sum is agreed to be paid, and becomes due as liquidated damages on the violation of an agreement, the parties are bound, both at law and in equity, to abide by such agreement. (*u*) Nor can the jury obviate the effect thereof, by giving damages commensurate only with the actual injury sustained ; and if they do, the court will, even after a verdict for the smaller amount of damages, grant a new trial. (*v*)

[Courts of equity will, in general, enforce a contract by specific performance or injunction ; notwithstanding it is by the same contract agreed that a fixed sum shall be paid upon a breach, unless it appears to be the intention of the contract that the party is to be at liberty to do the act if he pays the money. (*v*¹)

Thus courts of equity will enforce specifically an agreement embodied in a penal bond, conditioned to make a settlement of

(*g*) *Galsworthy v. Strutt*, 1 Exch. 659 ; and see *Reynolds v. Bridge*, 6 E. & B. 528 ; *Leighton v. Wales*, 3 M. & W. 545 ; *Atkyns v. Kinnier*, 4 Exch. 766, 783 ; [*Beale v. Hayes*, 5 Sandf. 640 ; *Bagley v. Peddie*, 5 Sandf. 192.]

(*r*) *Mercer v. Irving*, E., B. & E. 563.

(*s*) Per Parke B. *Galsworthy v. Strutt*, 1 Exch. 659, 665.

(*t*) See *Irving v. Manning* (in Dom. Proc.), 6 C. B. 391, 422.

(*u*) *Lowe v. Peers*, 4 Burr, 2225, 2229 ; *Barton v. Glover*, Holt N. P. C. 43, 46.

(*v*) *Farrant v. Olmuis*, 3 B. & Ald. 692.

(*v*¹) [Per Sir E. Sugden L. C. in *French v. Macale*, 2 Dr. & Wal. 269, 272, 284 ; and see *Coles v. Sims*, 5 De G., M. & G. 1, 9 ; 23 L. J. Ch. 258, 259 ; *Howard v. Woodward*, 34 L. J. Ch. 47.]

land; (*v*²) and a contract for the sale of land, with a stipulation that if either party break the contract he shall pay 100*l.*; (*v*³) and a covenant not to build on certain land subject to a penalty for breach of the covenant. (*v*⁴) A solicitor's clerk, having agreed with his employer not to carry on the business of a solicitor within fifty miles of a given place, executed a bond, the condition of which, after reciting such agreement, provided that if he did carry on the business within the specified distance, and paid the sum of 1,000*l.* as liquidated damages, the bond should be void; the court granted an injunction to restrain the clerk from practising within the specified distance, the employer undertaking not to sue the clerk upon the bond. (*v*⁵)

If the plaintiff has stipulated for a certain performance, and in case of breach for the payment of liquidated damages, he cannot claim both the liquidated damages, and also an injunction to restrain the breach; (*v*⁶) and if the defendant has stipulated for the option either to perform the contract, or to pay a sum of money instead of performance, he cannot be compelled in equity to specific performance.] (*v*⁷)

2. Proceeding for a Penalty, or more.

In all articles guarded by *penalties*, there are two remedies which may be pursued at the option of the party injured: either he may have, as often as the articles are broken, an equitable relief upon the footing of the articles themselves, for a partial breach of contract; or he may take the penalty — that is to say, where there is a penalty and a covenant in the same deed, the party has his election either to sue for the penalty, or to bring an action on the covenant for damages. But, in the former case, the contract is rescinded and the penalty becomes the debt in law, — subject, of course, to relief in equity, and to the restrictions imposed by the mode of proceeding in a court of law, under the 8 & 9 Will. 3, c. 11, s. 8. And if the penalty be paid according to the stipulation of the articles, or be recovered as the debt

Rules as to.

(*v*²) [Hobson *v.* Trevor, 2 P. Wms. 191; 47; and see Fox *v.* Scard, 33 Beav. 327; Chilliner *v.* Chilliner, 2 Ves. sen. 528; Clarkson *v.* Edge, 33 Beav. 227.]

Prebble *v.* Boghurst, 1 Swan. 309, 328; (*v*⁶) [Carnes *v.* Nisbett, 7 H. & N. 158, 778; Sainter *v.* Ferguson, 1 Mac. & G. 286; Fox *v.* Scard, 33 Beav. 327, 328.]

(*v*³) [Howard *v.* Hopkyns, 2 Atk. 371.]

(*v*⁴) [Coles *v.* Sims, 5 De G., M. & G. 1.]

(*v*⁵) [Howard *v.* Woodward, 34 L. J. Ch.

(*v*⁷) [Woodward *v.* Gyles, 2 Vern. 119; Magnanc *v.* Archbold, 1 Dow, 107; Sainter *v.* Ferguson, *supra*.]

in law, the party cannot afterwards have an action for breach of the contract, or obtain an injunction to restrain such breach. (x)

He may, however, elect to bring his action on the contract; and, according to the nature of the case, he may recover in damages even beyond the amount of the penalty. (y)

3. Of the Amount recoverable in other Cases.

Wherever a party is liable for a breach of contract, either express or implied, it seems that the plaintiff is entitled at all events to *nominal* damages; (y¹) although the action be framed in *tort* for such breach of contract, and no actual damage be proved. (z)

(x) *Sainter v. Ferguson*, 1 M'N. & G. 286; *Carnes v. Nesbitt*, 7 H. & N. 778.

(y) *Winter v. Trimmer*, 1 Bl. 395; *Harrison v. Wright*, 13 East, 343.

(y¹) [M'Daniel v. Terrell, 1 Nott & McC. 343.]

(z) *Rolin v. Steward*, 14 C. B. 595; *Marzetti v. Williams*, 1 B. & Ad. 415; *Street v. Blay*, 2 Ib. 459; per *Tindal C. J. Godefroy v. Jay*, 7 Bing. 413, 419. [Every breach of contract, as being an infringement of a right, imports some damage in law; so that if the plaintiff succeeds in establishing a breach of contract, but fails in showing an appreciable damage in fact occasioned by it, he is nevertheless entitled in law to judgment for damages, which, as they exist only in name and not in amount, are called nominal. *Marzetti v. Williams*, 1 B. & Ad. 415; *Wilde v. Clarkson*, 6 T. R. 308; *Warre v. Calvert*, 7 Ad. & El. 143; *Tindal C. J. in Godefroy v. Jay*, 7 Bing. 413, 419; *Sowdon v. Mills*, 30 L. J. Q. B. 175. "Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity." They have also been called "a mere peg on which to hang costs," meaning thereby that the plaintiff may be entitled to sue for nominal damages for the purpose only of recovering his costs. *Maule J. in Beaumont v. Greathead*, 2 C. B. 494, 499. In an action for the non-payment of a debt or liquidated demand in money, the general measure of damages is the amount of the debt or de-

mand, together with the amount of interest, if any interest is payable. The damages for the mere detention of the debt beyond the day of payment, are nominal; that is to say, the creditor is entitled to bring an action for the detention of the debt, but is not entitled to recover more than the amount of the debt and interest, and the costs of the action. If he accepts payment of the debt before commencing an action, he cannot afterwards commence an action to recover nominal damages merely for the detention; *Beaumont v. Greathead*, 2 C. & B. 494; but if he accepts payment, after commencing an action, he is entitled to continue the prosecution of the action in respect of the nominal damages, in order to recover the costs of his suit, unless the payment was accepted in satisfaction of his entire claim, including such damages and costs, in which case his right of action is completely discharged. *Thame v. Boast*, 12 Q. B. 808; *Gell v. Burgess*, 7 C. B. 16; *Nosotti v. Page*, 10 C. B. 643; *Cook v. Hopewell*, 11 Exch. 555; *Goodwin v. Cramer*, 12 Q. B. 575; *Kemp v. Balls*, 10 Exch. 607; *Lowe v. Steele*, 15 M. & W. 380; *Randall v. Moon*, 12 C. B. 261. For cases where nominal damages may or may not be recovered, see, further, *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595; *Bushell v. Beavan*, 1 Bing. N. C. 103; *Brown v. Price*, 4 C. B. N. S. 598; *Joule v. Taylor*, 7 Exch. 58; *Fieze v. Thompson*, 1 Taunt. 121.]

But in an action on a promissory note, to which the defendant pleaded payment, it was held that the jury were not bound to give the plaintiff nominal damages, although it appeared that the money was not paid until some time after the maturity of the note. (a)

In an action for the recovery of a sum certain, which the defendant has not shown any ground for reducing, *e. g.* by proving a partial failure of consideration or the like, it is obviously the duty of the jury to give the plaintiff ^{When claim is for a fixed sum.} neither more nor less than the specified sum. (b) Thus, in *Lethbridge v. Mytton*, (c) it appeared that the defendant, by a settlement made upon his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates to the amount of 19,000*l.* within a year; and it was held that, on his failure to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, although no

(a) *Beaumont v. Greathead*, 2 C. B. 494; and see *Thame v. Boast*, 12 Q. B. 808, 815.

(b) See *Bac. Abr. Damages* (D. 1). [In an action on a contract for a sum certain, the contract itself furnishes the rule of damages. *Marsh v. Tyler*, 1 Day, 1; *Lealand v. Stone*, 10 Mass. 462; *Knapp v. Maltby*, 13 Wend. 587; *Courcier v. Graham*, 1 Ohio, 330. Where an oral contract was made between A. and B., by which A. was to purchase of B. a parcel of land, and pay for it in certain services at a fixed price, but B. had afterwards put it out of his power to convey the land; in an action by A., who had performed the services to recover for them, he was held entitled only to the price fixed, and was not allowed to give evidence of the value of the land. If, however, no price had been fixed, the value of the land might have been proved, not as conclusive of the amount of the damages, but as a means of ascertaining the opinion of the defendant in reference to the value of the services. *King v. Brown*, 2 Hill (N. Y.), 485. But where one half of a sum certain was payable in specie, and the other half in bankable paper, the value of the bankable paper at the time it was to have been paid, was held to be the measure of damages for its non-pay-

ment. *Van Vleet v. Adair*, 1 Blackf. 346; *Coldren v. Miller*, 1 Blackf. 296. And wherever there is an express agreement, open and unrescinded, for the breach of which an action is brought, the rule of damages is not the consideration paid, but the value of the thing to be given, or of the act to be done, at the time or the place where it was to be given or done. *Wells v. Abernethy*, 5 Conn. 222; *Mitchell v. Gile*, 12 N. H. 394. See, also, *Howard v. Person*, 2 Hayw. 335; *Gleason v. Pinney*, 5 Cowen, 152; *Nelson v. Ford*, 2 Ham. 474; *Stevens v. Lyford*, 7 N. H. 360; *Foot v. Catlin*, 6 Vt. 54.] But where the plaintiff declared upon an assumpsit to pay, as the price of a horse, "a barley-corn a nail, for each nail in the horse's shoes, doubling every nail;" and averred that there were thirty-two nails in every shoe, which, doubling every nail, came to 500 quarters of barley; on the cause being tried before Hyde J. he directed the jury to give the value of the horse in damages; and accordingly they gave 8*l.*; and held good; *James v. Morgan*, 1 Lev. 111; S. C. 1 Keb. 569; and see *Thornborough v. Whitacre*, 6 Mod. 305; S. C. 2 Ld. Raym. 1164; and per *Hardwicke C.* *Earl of Chesterfield v. Janson*, 1 Wils. 295.

(c) 2 B. & Ad. 772.

special damage was laid or proved ; and an inquisition on which nominal damages had been given was set aside, and a new writ of inquiry awarded.

So, where the plaintiff and the defendant were joint makers of a promissory note, the defendant as principal, and the plaintiff as surety, and the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default ; it was held, in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount thereof by way of damages. (*d*) So where B., being indebted to the defendant in the sum of 500*l.*, handed to him a bill for 600*l.*, which the defendant agreed to discount, on the terms of retaining to his own use 100*l.* and the discount, and paying over the difference ; and the defendant retained the bill, but did not pay over any part of the proceeds to B. ; it was held that, B. having become bankrupt, his assignees were entitled to recover from the defendant the full amount of the bill, minus the 100*l.* and such discount as the jury should find to be receivable by the defendant. (*e*) And where A., having recovered judgment for 280*l.* against B., agreed with C. to forbear to sue out execution until a certain day ; and C., in consideration thereof, agreed that he would, on or before that day, erect a substantial house, and cause a lease of it to be granted to A., such lease, when granted, to be in satisfaction of the judgment ; it was held, in an action for the breach of this agreement, that the damages were properly estimated at the amount of the judgment debt. (*f*)

But where the amount agreed to be paid is uncertain, *e. g.* where the claim is for unliquidated damages. where the contract is a contract to indemnify, the plaintiff will be entitled to recover, as damages, the actual loss which he has sustained by reason of the defendant's breach ; and the amount of such damages is purely a question for the jury. (*g*)

Again : where an action is brought to recover general damages for a breach of contract, the jury may take into their consideration any consequential damages which the plaintiff has sustained by reason of such breach ; provided such

(*d*) *Loosemore v Radford*, 9 M. & W. 657. (*f*) *Strutt v. Farlar*, 16 M. & W. 249.

(*e*) *Alder v. Keighley*, 15 M. & W 117 ; 389.

and see *Hill v. Smith*, 12 M. & W. 618.

(*g*) See *Walker v. Broadhurst*, 8 Exch.

damages may fairly and reasonably be considered, either as arising naturally—*i. e.* according to the usual course of things,—from the breach of the contract itself; or may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was made, were communicated by the one party to the other, so as to be known to both, the damages which they would reasonably contemplate as being likely to result from the breach of such a contract, would be the amount of injury which would ordinarily follow from a breach of contract, under those special circumstances so known and communicated. But if the special circumstances were wholly unknown to the party breaking the contract, he can be supposed to have had in his contemplation, only the amount of injury which would arise from such a breach of contract generally, and in the great multitude of cases not affected by such special circumstances. (*h*)

(*h*) Per Cur. *Hadley v. Baxendale*, 9 Exch. 341, 354; and see *Cory v. Thames Iron Works Co.* L. R. 3 Q. B. 181, 188; *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92; *Brady v. Oastler*, 3 H. & C. 112; *Portman v. Middleton*, 4 C. B. N. S. 322; *Smeed v. Foord*, 1 E. & E. 602; *Gee v. Lancashire & Yorkshire Railway Co.* 6 H. & N. 211; *Wilson v. Same*, 9 C. B. N. S. 632; *Collard v. South Eastern Railway Co.* 7 H. & N. 79; *Cort v. Ambergate & c. Railway Co.* 17 Q. B. 127; 20 L. J. Q. B. 460, 466; *Vicars v. Wilcocks*, 8 East, 1; *Newman v. Zachary*, Aleyn, 3; *Flower v. Adam*, 2 Taunt. 314; [*British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499; *Horne v. Midland Railway Co.* L. R. 131; 8 C. P. 131; *In re The Trent & Humber Co.* L. R. 6 Eq. 396; 4 Ch. Ap. 112; *France v. Gaudet*, L. R. 6 Q. B. 199; *Mossmere v. New York Shot & Lead Co.* 40 N. Y. 422; *Benjamin Sales* (2d ed.), 728 *et seq.* In the case of *Hadley v. Baxendale*, *supra*, the owner of a mill employed a carrier to convey a broken shaft belonging to the mill to be delivered to an engineer for the purpose of being repaired, and the carrier committed a breach of contract by delaying the carriage, there-

by causing a delay in repairing the shaft, and the stoppage of the mill; it was held, that the mill-owner was not entitled to recover from the carrier compensation for the loss occasioned by the stoppage of the mill, as damage caused by his breach of contract in delaying the carriage of the shaft, because the stopping of the mill was not contemplated by the parties in making the contract as a consequence of the breach, and the special circumstances by which it was brought about were not communicated to or known by the carrier. *Hadley v. Baxendale*, 9 Exch. 341. The rule laid down in *Hadley v. Baxendale* has been adopted in the following cases: In actions against carriers for the non-delivery of goods, it may be assumed, in general, to be within their contemplation that goods sent may be intended for sale, and accordingly they are held responsible for the market value of the goods at the time and place at which they ought to have been delivered; so that in case of delay the loss sustained by a fall in the market is recoverable as damages, without any special notice to the carrier that the goods were intended for sale. *Collard v. South Eastern Railway Co.* 7 H. & N. 79; *Wilson v.*

Thus, where the defendant, a broker, contrary to the orders of the plaintiff, his principal, purchased goods of an inferior quality,

Lancashire & Yorkshire Railway Co. 9 C. B. N. S. 632; *Rice v. Baxendale*, 7 H. & N. 96; *O'Hanlan v. Great Western Railway Co.* 6 B. & S. 484; *Deming v. Grand Trunk Railroad Co.* 48 N. H. 455; *Cutting v. Grand Trunk Railroad Co.* 13 Allen, 381; *Sisson v. Cleveland & Toledo Railroad*, 14 Mich. 489; *Scoville v. Griffith*, 2 Kernan, 352, 358. But the carrier is not in general responsible for the failure of any peculiar purpose for which the goods are intended, of which he has no notice. *Wilson v. Lancashire & Yorkshire Railway Co.* *supra*; *Great Western Railway Co. v. Redmayne*, L. R. 1 C. P. 329. Thus, in an action against a carrier for delay in delivering bales of cotton sent by him, it was held that the plaintiff was not entitled to recover, as the natural consequence of such delay, the loss arising from the stoppage of his mill for want of cotton to work. *Gee v. Lancashire & Yorkshire Railway Co.* 30 L. J. Exch. 11; 6 H. & N. 211. So in an action by a passenger against a carrier for failing to carry him to the end of the journey, it was held that, though he was entitled to recover the costs of completing the journey, he could not recover as damage the loss sustained through the special purpose of his journey being frustrated by reason of the delay. *Hamlin v. Great Southern Railway Co.* 1 H. & N. 408; and see *Phelps v. London & North Western Railway Co.* 19 C. B. N. S. 321. Where goods were contracted to be delivered, which the seller knew were intended to be sold again, and he failed to deliver them; there being no market at which the buyer could replace the goods, he was held entitled to recover as special damages his loss of profits on resales which he was unable to complete. *Borries v. Hutchinson*, 18 C. B. N. S. 445. The plaintiff, a farmer, contracted with the defendant for the delivery of a threshing-machine at an appointed time, for the purpose of threshing his wheat out in the field, of which the defendant had notice; in consequence of delay in delivering the machine the wheat

was injured by exposure to the weather, and the plaintiff was obliged to carry and stack it and dry it in a kiln; in an action for the delay in the delivery of the machine it was held, expressly in accordance with the rule laid down in *Hadley v. Baxendale*, that the plaintiff was entitled to damages in respect of the injury to the wheat and the additional expenses incurred. *Smeed v. Foord*, 28 L. J. Q. B. 178; 1 E. & E. 602. The plaintiff, having contracted with a third party to repair a machine by an appointed time, contracted with the defendant for a necessary part of the machine to be supplied at a time which would enable him to complete the repair, but he did not inform the defendant of the special purpose for which he required it; the defendant failed in supplying the piece of machinery according to his contract, in consequence of which the plaintiff failed in completing the repairs which he had contracted to do and was compelled to pay damages for his breach of contract; it was held that, according to the rule laid down in *Hadley v. Baxendale*, he could not recover such damages against the defendant. *Portman v. Middleton*, 4 C. B. N. S. 322. It has been suggested, as an addition to the rule laid down in *Hadley v. Baxendale*, that after the contract has been made, but in the course of performance of it, and before it is actually broken, one of the parties may give notice to the other of the special consequences which will happen upon his breach of contract, and so fix him with the damages which he may occasion by persisting in breaking the contract after such notice. Per Bramwell B. in *Gee v. Lancashire & Yorkshire Railway Co.* 6 H. & N. 211, 218; and see *Bramley v. Chesterton*, 2 C. B. N. S. 592. Upon the breach of contract for the delivery of merchandise, the plaintiff cannot recover damages for his trouble and expenses in procuring the contract to be made. *Stevens v. Lyford*, 7 N. H. 360. Mere speculative injuries depending on contingencies and events wholly uncertain in themselves,

per quod one J. S., who had commissioned the plaintiff to purchase the goods for him, sued the plaintiff for the bad quality of the

and having no intimate and immediate connection with the unlawful act, or breach of contract complained of, furnish generally no legitimate basis on which to calculate damages. *Bishop v. Williamson*, 2 Fairf. 504. See, also, *Hayden v. Cabot*, 17 Mass. 169; 2 Kent, 480; *Griffin v. Colver*, 16 N. Y. 489. But in an action for the breach of a special contract, the plaintiff may recover, as part of his damages, such profits as would have accrued to him from the contract itself, if it had been performed; but not those which he would have realized from other contracts entered into for the purpose of fulfilling such special contract. *Fox v. Harding*, 7 Cush. 516. In this case Mr. Justice Bigelow said: "To illustrate this by the case at bar. The plaintiffs had a right to recover such sum in damages, as they would have realized in profits, if the contract had been fully performed. To ascertain this, it would be necessary to estimate the cost and expense of work and materials in completing the contract on their part, and to deduct this sum from the contract price. The balance would be profit, which would have accrued to them out of the contract itself, if it had been fulfilled, and which they have a right to recover in addition to such further sum as would compensate them for the labor and materials supplied towards the completion of the contract. But if the plaintiffs had offered to prove in addition to this, that in consequence of the breach of the contract by the defendants, they had lost other contracts by which they would have realized large profits, and which they had entered into for the purpose of fulfilling their contract with the defendants, the evidence would have been wholly inadmissible; because such collateral undertakings were not necessarily connected with the principal contract, and cannot be reasonably supposed to have been taken into consideration when it was entered into. Such profits are too uncertain, remote, and speculative in their nature, and form no proper basis of damages."

See *Masterton v. Brooklyn*, 7 Hill, 61; *Batchelder v. Sturgis*, 3 Cush. 205; *Bridges v. Stickney*, 38 Maine, 361; *Peterson v. Ayre*, 13 C. B. 353; *Bramley v. Chester-ton*, 2 C. B. (N. S.) 592; *Griffin v. Colver*, 16 N. Y. 489. In *Griffin v. Colver*, 16 N. Y. 489, it was held that, upon the breach of a contract to deliver at a certain day a steam-engine, built and purchased for the purpose of driving a planing-mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine, may be recovered as damages. See, also, *Freeman v. Clute*, 3 Barb. 424. In *Philadelphia & C. Railroad Co. v. Howard*, 13 How. (U. S.) 307, 344, Mr. Justice Curtis said: "It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term profits in this construction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. In the case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks that attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law that requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and

goods, and recovered damages and costs; it was held, that the measure of damages was, not the mere difference in price between the two kinds of goods, but the amount of the damages and costs recovered in the action against the plaintiff. (*i*) So where the tenant, under a lease which contains a covenant to repair, underlets the premises to a person who agrees to indemnify him against breaches of that covenant; and the original lessor brings an action on the covenant against his lessee, and recovers; it seems that the damages and costs recovered in that action, and also the costs of defending it, may be recovered as special damages, in an action against the under-tenant for the breach of his agreement to indemnify. (*j*) So, if the defendant contract with A. to do certain work by a time named, and, by reason of the defendant's breach of this contract, A. is himself prevented from fulfilling a contract made by him with a third party; A. may recover the loss of profit thereby occasioned, as damages in an action against the defendant; (*k*) even although the contract between the plaintiff and the third party was void under the statute of frauds. (*l*)

So, if a man buy a horse with a warranty, and, relying thereon, resell him with a warranty; and, being sued on the warranty by his vendee, he offers the defence to his vendor, who gives no directions as to the action; the first vendee, if he defend that action, is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty; (*l*) unless, that is,

not the difference between the agreed price of something contracted for and its ascertainable value, or cost. We hold it to be a clear rule, that the gain or profit, of which the contractor was deprived, by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages." See *Griffin v. Colver*, 16 N. Y. 489.]

(*i*) *Mainwaring v. Brandon*, 8 Taunt. 202. The court, however, compelled the plaintiff to undertake that he would assign the goods to the defendant, or sell and account with him for the net proceeds.

(*j*) See *Logan v. Hall*, 4 C. B. 598; *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249; *Neale v. Wylie*, 3 B. & C. 533; and see further, *Smith v. Howell*, 6 Exch. 730; 20 L. J. Exch. 377. Damages in action, for breach of

covenant not to assign without license; *Williams v. Earle*, L. R. 3 Q. B. 739.

(*k*) *Waters v. Towers*, 8 Exch. 401.

(*l*) *Lewis v. Peake*, 7 Taunt. 153; [*Reggio v. Braggiotti*, 7 Cush. 166; *Armstrong v. Perry*, 5 Wend. 535. See *Voorthies v. Earl*, 2 Hill, 288. In an action for the breach of a warranty that the signature of an indorser on a note, transferred to the plaintiff by the defendant, was genuine, the plaintiff is entitled to recover, as part of his damages, the costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced such suit in good faith, not knowing that such signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature. *Coolidge v. Brigham*, 5 Met. 68.]

he might have known, by a reasonable examination of the horse before he defended the action, that the animal was unsound at the time he resold it. (*m*) [But he can in no case recover counsel fees paid for the defence of the action.] (*m*¹)

So, in an action for the breach of a warranty of a chain cable, it was held that the plaintiff might recover the value of the anchor to which the cable was attached, on proving that the cable was broken, and that the crew slipped it in order to avoid danger. (*n*)

But in an action on an undertaking to pay to the plaintiff, or his representatives, a sum of money in the event of death happening to him from railway accident, whilst travelling by railway; or a proportionate part of such sum, in the event of his sustaining personal injury from such accident; it was held, that the true measure of damages was the personal injury resulting from the accident; and not the remote consequences which might follow, owing to the business or profession of the plaintiff. (*o*)

Where a fresh action may be brought, and satisfaction obtained for any duty or demand, which has arisen under the defendant's contract since the commencement of the pending suit, the plaintiff is not entitled to recover in that suit any damages on account of such duty or demand. (*o*¹) But where the cause of action was complete at the time the pending suit was commenced, and the plaintiff could not maintain another action for any fresh damage which he might sustain from the defendant's breach of contract; there the jury not only may, but ought to take into their

Future damages.

(*m*) Per Cur. *Wrightup v. Chamberlain*, 7 Scott, 508, 602. See further, as to the damages recoverable in an action for the breach of a warranty of a horse, *Clare v. Maynard*, 6 A. & E. 519

(*m*¹) [*Reggio v. Braggiotti*, 7 Cush. 166; *Leffingwell v. Elliott*, 10 Pick. 204. But see *Swett v. Patrick*, 3 Fairf. 9; *Barnard v. Poor*, 21 Pick. 378; *Lincoln v. S. & L. S. R. R. Co.* 23 Pick. 425; *Good v. Mylin*, 8 Barr. 51; *Day v. Woodworth*, 13 How. (U. S.) 363.]

(*n*) *Borradaile v. Brunton*, 8 Taunt. 535. [Where merchandise is sold with a warranty as to quality, and the warranty fails, and the merchandise is totally lost in consequence of the breach of warranty, the price of transportation to the market where it was carried, and where the loss was first discovered, will be added in es-

timating the damages, in a case where the vendor knew it was destined for that market. But the mere loss of profits seems not to be allowable as part of the damages in such a case. *Lattin v. Davis, Hill & Denio* (N. Y.), 9.]

(*o*) *Theobald v. Railway Passengers' Assurance Co.* 10 Exch. 45. As to the measure of damages, in an action for breach of a covenant not to do any act whereby a policy of life insurance might be forfeited, see *Hawkins v. Coulthurst*, 5 B. & S. 343.

(*o*¹) [In an action to recover damages for carrying on a particular business in violation of a contract between the parties, no damages can be assessed for any violation subsequent to the commencement of the action. *Pierce v. Woodward*, 6 Pick. 206.]

consideration, in assessing the plaintiff's damages, any loss which he will probably sustain *in futuro*, by reason of the defendant's breach of contract. (*p*)

And where a man buys with a warranty, and sells with a similar warranty, and the warranty is broken; the first vendee may, in an action against his vendor for breach of the warranty, recover in respect of damages claimed by the second vendee, and which the first vendee has agreed to make good, although no amount has been fixed, nor any sum actually paid. (*q*)

And we have seen that, by a late statute, *interest* may now be recovered as damages, in many cases in which it was not recoverable at common law. (*r*)

[Upon contracts for the sale of goods, the breaches for which damages are recoverable may be, on the part of the buyer, in not paying the price, or not accepting the goods, and on the part of the seller, in not delivering the goods according to the contract.]

In an action for not paying the price of goods sold, the amount recoverable is, in general, the price agreed upon in the contract, together with the amount of interest, if any interest is payable. The damages for the mere detention of the debt beyond the day of payment, are nominal; that is to say, the creditor is entitled to bring an action for the detention of the debt, but is not entitled to recover more than the amount of the debt and interest, and the costs of the action.

The measure of damages is the same, *i. e.* the contract price, whether the action be for goods sold and delivered, or for goods bargained and sold. In neither of these cases will the action lie unless the title to the goods has vested in the vendee; and whenever the title has vested in the vendee, he is, of course, the owner of them, and the vendor is entitled to recover the price agreed to be paid for them. (*r*¹)

(*p*) See 2 Wms Saund. 171 b; Richardson v. Mellish, 2 Bing. 229, 240; and see Hodson v. Stallebrass, 11 A. & E. 301. [As to the measure of damages in contracts for future deliveries in instalments, see Benj. Sales (2d ed.), 737-739; Simpson v. Crippin, L. R. 8 Q. B. 14; Brown v. Muller, L. R. 7 Exch. 319; Roper v. Johnson, L. R. 8 C. P. 167. In an action for breach of a bond, binding the obligor not to exercise a trade for a limited time

and within certain limits, damages sustained even after the date of the writ, up to the time of trial, were held recoverable, in Whitney v. Slayton, 40 Maine, 224.]

(*q*) Randall v. Raper, E., B. & E. 84.

(*r*) *Ante*, 960. [See Dox v. Dey, 3 Wend. 356; 9 Wend. 129.]

(*r*¹) [Gordon v. Norris, 49 N. H. 376; Thompson v. Alger, 12 Met. 428, 443; Ganson v. Madigan, 13 Wis. 67; Sands v. Taylor, 5 John. 395, 411; Bement v. Smith,

Where by the terms of the contract the goods are to be paid for by a bill of exchange, and the bill is not given, interest may be recovered upon the amount of the bill, as if it had been given, as part of the price of the goods. (*r*²)

If the goods have been sold with a warranty, the buyer, on being sued for the price, may give evidence of the breach of warranty in reduction of damages, and the contract price will be reduced by the diminution in value, owing to the defect warranted against. (*r*³) But the buyer cannot, in further reduction of the price, give evidence of special damages caused by the breach of warranty, though he might be entitled to recover such damages in an action upon the warranty.] (*r*⁴)

In an action for not accepting goods, the measure of damages is the difference between the contract price and the market price, on the day when the vendee ought to have accepted the goods. (*s*) And in an action for not accepting railway shares, the measure of damages is the difference of the price of the shares on the day when they ought to have been accepted, and on the day when they were resold by the vendor, such resale being within a reasonable time. (*t*)

Actions for
not accept-
ing goods,
&c.

We have already considered what damages are recoverable in an action for not delivering goods; (*t*) or for delivering goods inferior in quality to those contracted for. (*u*)

Actions for
not deliver-
ing goods,
&c.

15 Wend. 493-495, 497; Sedgwick Damages (5th ed.), 312-316; Mayne Damages (2d Eng. ed.), 116; Alexander v. Gardner, 1 Bing. N. C. 677; Hutchinson v. Reid, 3 Camp. 329; Atkinson v. Bell, 8 B. & C. 277; Rohde v. Thwaites, 6 B. & C. 392; Messer v. Woodman, 22 N. H. 172; Ockington v. Richey, 41 N. H. 279; Bailey v. Smith, 43 N. H. 143; Penniman v. Hartshorn, 13 Mass. 87; Langfort v. Tiler, 1 Salk. 113; Jones v. Marsh, 22 Vt. 144; Gaskell v. Morris, 7 Watts & S. 32; Graham v. Jackson, 14 East, 498.]

(*r*²) [Marshall v. Poole, 13 East, 98; Farr v. Ward, 3 M. & W. 25; Davis v. Smyth, 8 M. & W. 399.]

(*r*³) [Street v. Blay, 2 B. & Ald. 456; Allen v. Cameron, 1 C. & M. 832; Poulton v. Lattimore, 9 B. & C. 259, *ante*.]

(*r*⁴) [Mondel v. Steel, 8 M. & W. 588; Rigge v. Burbidge, 15 M. & W. 598.]

(*s*) Barrow v. Arnaud (in Cam. Scac.), 8 Q. B. 595, 610; Phillpots v. Evans, 5 M. & W. 475; Leigh v. Paterson, 8 Taunt. 540; [Boorman v. Nash, 9 B. & C. 145; Gordon v. Norris, 49 N. H. 376; Thompson v. Alger, 12 Met. 428, 443; Allen v. Jarvis, 20 Conn. 38; Orr v. Bigelow, 14 N. Y. 556; Dana v. Fiedler, 2 Kernan, 41; Ballentine v. Robinson, 46 Penn. St. 177; Ganson v. Madigan, 13 Wis. 37; Whitmore v. Coats, 14 Missou. 9; Northup v. Cook, 39 Missou. 208; Haines v. Tucker, 50 N. H. 307; Griswold v. Sabin, 51 N. H. 167.]

(*t*) Stewart v. Cauty, 8 M. & W. 161; Pott v. Flather, 11 Jur. 735; [Boswell v. Kilborn, 15 Moore P. C. C. 309; Haines v. Tucker, 50 N. H. 307.]

(*u*) *Ante*, 621-624; and see Peterson v. Ayre, 13 C. B. 353. As to the law of Scotland on this subject, see Dunlop v.

In an action for not delivering shares in a projected railway, the vendee may recover the difference between the price agreed on, and the market price on the day on which the sale should have been completed. But he is not entitled to damages in respect of a further advance which took place afterwards, at the time of the actual issuing of the scrip. (*x*)

So it would seem that, in an action for not completing and delivering a ship by the time named in the contract, the measure of damages is, the difference of the value of the voyage at the time she ought to have been delivered, and at the time when she was actually delivered. (*y*)

So in an action for not loading a ship pursuant to charter-party, the measure of damages is, what the ship would have earned if the charter had been fulfilled, *minus* the expenses which would be incurred by the shipowner in earning it, and anything the ship may have earned during the time over which the charter extended. (*z*)

So in an action for not replacing stock lent on a given day, according to agreement, the measure of damages is the price or value on the day when it ought to have been replaced, or the price on the day of the trial, or on the previous day, at the option of the plaintiff. (*a*) But it seems that if, after the appointed time, and while the market was rising, the defendant offered to replace; the criterion of damages would be the value of the stock at the time of such tender, not the increased value at the time of the trial. (*b*) Nor will it be of any avail to the plaintiff to state in the declaration that, by reason of the non-replacement, he was prevented from completing an advantageous contract which he had entered into. (*c*) And upon a contract to replace stock, and pay dividends in the mean time, although the jury give damages for the value of the stock and the amount of the dividends, yet, on affirmance of the judgment in error, the measure of increase is, not the further divi-

Higgins (in Dom. Proc.), 12 Jur. 295, 298. [As to the law where the price of goods has been paid in advance, *ante*, 622, note (*f*); Grout v. Gile, 51 N. Y. 431.]

(*x*) Tempest v. Kilner, 3 C. B. 253; Shaw v. Holland, 15 M. & W. 136.

(*y*) Per Willes J. Fletcher v. Tayleur, 17 C. B. 21, 29; or, the net profit which the plaintiff might have obtained by chartering the ship, if she had been delivered at the time named in the contract, instead

of when she was delivered; per Giffard V. C., *Ex parte* Cambrian Steam Packet Company, L. R. 6 Eq. 396, 409.

(*z*) Smith v. McGuire, 3 H. & N. 554.

(*a*) See Owen v. Routh, 14 C. B. 327; Shepherd v. Johnson, 2 East, 211; M'Arthur v. Lord Seaforth, 2 Taunt. 257; Harrison v. Harrison, 1 C. & P. 412.

(*b*) Shepherd v. Johnson, 2 East, 211.

(*c*) Per Cur. Parkins v. Howard, K. B. T. T. 1817.

dends that may have accrued, but interest upon the damages given as the value of the capital stock. (*d*)

There are some cases, however, in which the defendant may be regarded in the light of a wrong-doer in breaking his contract; and where this is the case, a greater latitude is allowed to the jury in assessing the damages. Thus, in an action upon a bond conditioned for the resignation of a living, — which the defendant had refused to give up on request, — the court held that, he being a wrong-doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff, by the defendant's life interest; nor in estimating the annual proceeds, to deduct the curate's stipend. (*e*) And they added: "Besides, it appeared at the trial, that the defendant had it in his power to relieve himself from this verdict by resigning the living; and if he does not do that, it is clear that he considers the damages found by the jury, as less than the value of the living to him." (*e*¹)

Where defendant may be regarded as a wrong-doer.

We have already referred to the rule, whereby the defendant, in an action for the breach of a contract, is allowed to give evidence of breaches of contract by the plaintiff, in order to reduce the damages. (*f*) But this rule does not admit of the damages being reduced, by showing a breach of contract on the plaintiff's part, subsequent to the commencement of the action. (*g*)

Evidence in reduction of damages.

4. Statement of the Damages in the Declaration.

In order to recover special damage, it is necessary that such dam-

(*d*) *Dwyer v. Gurry*, 7 Taunt. 14.

Bailey v. Shaw, 24 N. H. 297; *Armory v. Delamirie*, 1 Strange, 504; *Clark v. Miller*, 4 Wend. 628.]

(*e*) *Lord Sondes v. Fletcher*, 5 B. & Ald. 835.

(*e*¹) [On the other hand, if a contract be broken, and the party entitled to the benefit of it can protect himself from the loss consequent on its breach, at a trifling expense, or with reasonable exertions, it is his duty to do it. And he can charge the delinquent party with such damages only as with reasonable endeavors and expense he could not prevent. *Miller v. Mar. Church*, 7 Greenl. 57. Where a party in possession of property prevents the owner from showing its quality, he may, upon being shown liable for its value, be charged for the best quality of such an article.

(*f*) *Ante*, 825 *et seq.*, and note, 1093, 1094. [In an action upon a contract for the price of articles which have been manufactured and delivered to the defendant according to the contract, the damages will not be reduced by evidence that the articles, after the delivery, were taken and sold on execution as the property of the plaintiff; because the defendant may have his remedy by an action of trespass against the officer. *Flagg v. Dryden*, 7 Pick. 52.]

(*g*) *Per Jervis C. J. Bartlett v. Holmes*, 13 C. B. 630, 638.

age should be expressly stated in the declaration, so that the defendant may be prepared to dispute the facts. (*g*¹) But damages which *necessarily*, and by implication of law, ensue from the non-performance of the contract, need not be expressly stated, they being recoverable under the common conclusion of the declaration. (*h*)

And the court will not arrest the judgment, because the damages were stated too generally in the declaration. (*i*)

5. Damages, how assessed.

Where the parties have not furnished the criterion of damages, by stipulating for the payment of a liquidated sum as such, it is, in general, entirely the province of the jury to assess the amount, with reference to the circumstances of the particular case. (*k*)

When, therefore, a cause goes to trial upon issue joined, the sum to be recovered is always ascertained by the jury. (*l*)

So, before the passing of the 15 & 16 Vict. c. 76, s. 94, a writ of inquiry was, in general, awarded upon a judgment by default, or on demurrer. But it was held that this was a mere inquest of office, to inform the conscience of the court; and that they themselves might, if they pleased, assess the damages, or direct them to be assessed by the proper officer. (*m*)

Accordingly it was long the practice for the plaintiff—on obtaining judgment by default, or on demurrer, in actions on bills of exchange and promissory notes; and also in actions on deeds, or other instruments under seal, for the payment of a specific sum—

(*g*¹) [*M'Daniel v. Ferrell*, 1 Nott & M'C. 343; *Brown v. Gibson*, 1 Nott & M'C. 326; *Stevens v. Lyford*, 7 N. H. 360.]

(*h*) See 1 Chit. on Pl. 6th ed. 338; and per Lord Tenterden C. J. *Boorman v. Nash*, 9 B. & C. 152; [*Stevens v. Lyford*, 7 N. H. 360; *Williamson v. Dillon*, 1 H. & Gill, 444.]

(*i*) See *Rodgers v. Nowill*, 5 C. B. 109.

(*k*) As to paying money into court, see 15 & 16 Vict. c. 76, s. 70. See, as to *pleading* payment into court in *ordinary* cases, *Ib.* s. 71. [On bonds of indemnity, damages are always assessed up to the time of trial. *Spear v. Tracy*, 26 Vt. 61.]

(*l*) [See *Baker v. Wheeler*, 8 Wend.

508.] When the omission of the jury, upon the trial of an issue, to assess the damages, may be supplied by a writ of inquiry: *Pilford's case*, 10 Co. 118; *Herbert v. Waters*, Carth. 362; *Kynaston v. Mayor of Shrewsbury*, Str. 1052; *Clement v. Lewis*, 3 B. & B. 297; *Tidd*, 9th ed. 574, 896.

(*m*) *Tidd*, 9th ed. 573, citing 2 Wms. Saund. 107, note (2); *Hewitt v. Mantell*, 2 Wils. 372, 374; *Bruce v. Rawlings*, 3 Ib. 61, 62; *Thelluson v. Fletcher*, 1 Dougl. 316; *Rashleigh v. Salmon*, 1 H. Bl. 252; *Shepherd v. Charter*, 4 T. R. 275; *Blackmore v. Flemyng*, 7 Ib. 446; *Gould v. Hammersley*, 4 Taunt. 148; *Brill v. Neele*, 1 Chit. 621, note.

to apply to the court in term time, or to a judge in vacation, for a rule or summons, to show cause why it should not be referred to the master to compute what was due for principal and interest, and to tax the plaintiff his costs; and why final judgment should not be signed thereon, without executing a writ of inquiry. And the usual course was, for the court or a judge to grant a rule absolute, or an order for that purpose, on an affidavit of service of such summons or rule, unless cause were shown to the contrary. (*n*)

But the courts confined this practice to cases in which their officers, by calculating the amount due from the instrument itself, could evidently do as complete justice between the parties as could be effected by a jury. And, accordingly, they held that where the quantum of damages was not a mere matter of calculation, — *e. g.* in *assumpsit* on an agreement, although the action was brought for the recovery of a sum certain claimed to be due thereon; (*o*) or in *assumpsit* on a foreign judgment; (*p*) or on a bill of exchange for foreign money, (*q*) — a writ of inquiry was necessary.

By the 15 & 16 Vict. c. 76, s. 94, however, the power of dispensing with a writ of inquiry has been extended, to 15 & 16 Vict.
c. 76, s. 94. “all actions in which it shall appear to the court or a judge, that the amount of damages sought to be recovered by the plaintiff, is substantially a matter of calculation.” And hence it would seem, that the exceptions which, as above stated, formerly prevailed in practice on this subject, will no longer apply.

Where the declaration contains several counts, the safer course is, for the jury to assess the damages separately on each; for where the damages are so assessed, and one count is bad, the judgment can be arrested, if at all, on that count only. (*r*) But the rule on this subject at the present day seems to be, that where general damages are given on a declaration which contains one bad count, or in which several breaches are assigned, one of which is bad, the court will not arrest the judgment, but will award a *venire de novo*. (*s*)

(*n*) Tidd, 9th ed. 571, 572, 870; Shepherd *v.* Charter, 4 T. R. 275; Rashleigh *v.* Salmon, 1 H. Bl. 252; Goldsmid *v.* Tate, 2 B. & P. 55. Rules to compute were abolished by the 15 & 16 Vict. c. 76, s. 92.

(*o*) Tidd, 9th ed. 571, 572, 870.

(*p*) Messin *v.* Lord Massacreene, 4 T. R.

493; Hunter *v.* Bowes, cited 1 M. & S. 173.

(*q*) Maunsell *v.* Lord Massacreene, 5 T. R. 87.

(*r*) Hayter *v.* Moat, 2 M. & W. 56; Grant *v.* Astle, 2 Dougl. 730; 2 Wms. Saund. 171 a.

(*s*) Corner *v.* Shew, 4 M. & W. 163;

Rule as to
assessing
damages,
where there
are several
counts

On the other hand, where the declaration contains two or more counts which are good, but which cannot be joined, (*t*) and the jury find general damages, the judgment must be arrested, and the court cannot award a *venire de novo*. (*u*)

But where the same count contains two demands, for one of which the action lies and not for the other, all the damages shall be referred to the good cause of action; and the court will neither arrest the judgment, nor award a *venire de novo*. (*v*)

Several causes of action in one count.

6. Excessive, or too small Damages.

If the jury give *excessive* damages, the court will grant a new trial. But there is always a disinclination in the courts to listen to applications of this nature; nor will they, in general, disturb a verdict on this ground, unless the damages be such as to satisfy them that the jury, in giving them, either were actuated by, or proceeded upon some wrong principle. (*x*)

When the court will grant new trial in case of.

167; *Leach v. Thomas*, 2 M. & W. 427, overruling, as to this point, *Holt v. Scholefield*, 6 T. R. 691.

(*t*) By the 15 & 16 Vict. c. 73, s. 41, causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit, except in *replevin* or *ejectment*.

(*u*) *Corner v. Shew*, 1 M. & W. 163, 167; *Kitchenman v. Skel*, 3 Exch. 49.

(*v*) *M'Gregor v. Graves*, 3 Exch. 34; *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70, 71.

(*x*) *Per Cur. Creed v. Fisher*, 9 Exch. 472, 474. Were misled by prejudice, or gross mistake; *per Willes J. Berry v. Da Costa*, L. R. 1 C. P. 331, 334; and see *Williams v. Reeves*, 1 Chit. 729 a; *Tripp v. Thomas*, 3 B. & C. 427. In an action for breach of promise of marriage, a new trial on the ground of excessive damages will be refused, unless in a very strong case. *Smith v. Woodfine*, 1 C. B. N. S. 660; *Gough v. Farr*, 1 Y. & J. 477. [Where the amount of damages is matter of opinion merely, the fact that the jury have fixed the amount at a greater or less

sum than any of the witnesses, is not a ground for a new trial. *Hopkins v. Myers*, 1 Harper, 56; *Brewer v. Tyringham*, 12 Pick. 547. See *Harvey v. Huggins*, 2 Bailey, 252; *Park v. Hopkins*, 2 Bailey, 408; *Boyd v. Brown*, 17 Pick. 461. But where the verdict giving excessive damages is founded on a mistake of law, it may furnish ground for a new trial. See *Green v. Speakman*, 8 J. B. Moore, 339. If it appear that a jury has proceeded upon an incorrect principle in assessing damages (and the fact may be ascertained by inquiring of the jury when they return their verdict), a new trial will be granted. *Pierce v. Woodward*, 6 Pick. 206. See *Deems v. Quassier*, 3 Rand. 475; *Bodwell v. Osgood*, 3 Pick. 379; *Shute v. Bassett*, 7 Pick. 82; *Douglass v. Toucey*, 2 Wend. 352; *Reed v. Davis*, 4 Pick. 216; *Moody v. Baker*, 5 Cowen, 351; *Neal v. Lewis*, 2 Bay, 204; *Davis v. Davis*, 2 Nott & McCord, 81; *Riley v. Nugent*, 1 Marsh. 431; *Sheppard v. Lark*, 2 Bailey, 576; *Worster v. Proprietors of Canal Bridge*, 16 Pick. 547, 548; *Boies v. M'Allister*, 3 Fairf. 308; *Thurston v. Martin*, 5 Mason 479. If a verdict be for too large a sum,

And the courts, in the exercise of their discretion upon this subject, will refuse a new trial to reduce the damages, although the jury have given damages which the plaintiff's declaration did not strictly enable him to give in evidence; but which he might have recovered upon a declaration differently framed. Because, to allow a new trial on that ground would only have the effect of putting both parties to further expense, with every probability of the result being the same. (*y*) Thus where the defendant, who had contracted for jewellery, was to return it in a twelvemonth; and, if he omitted to do so, was to pay for it a certain sum *with interest*; and the plaintiff sued for the amount, the goods having been retained; but the only counts in the declaration applicable to the case were a count for goods sold, and a count for interest on money due and forborne; notwithstanding which the jury found a verdict for the sum demanded, *with interest*; the court refused to interfere, or to set aside the verdict. (*z*)

And it seems to be unusual to grant a new trial on account of the *smallness* of the damages, (*z*¹) especially where the amount is uncertain; although it would probably be granted in an action for a demand which is obviously certain, as upon a promissory note, if there were no pretence for giving the plaintiff less than the full amount. (*a*)

And the courts have sometimes set aside *inquisitions*, on account of the smallness of the damages. (*b*)

But where the damages found by the jury, have been calculated upon terms assented to by the counsel on both sides, the court will not interfere, on affidavits stating that counsel were mistaken in that which they assumed as the basis of their calculations. (*c*)

and the excess be ascertainable by mere arithmetical computation, it may be remitted, and after its remission the verdict will not be set aside on account of the excess. *Woods J. in Sanborn v. Emerson*, 12 N. H. 58. In *Blunt v. Little*, 3 Mason, 102, 107, Story J. ordered a new trial, unless the plaintiff would remit a certain sum from the amount of the verdict. See *Hodges v. Hodges*, 5 Met. 205.]

(*y*) *Mayfield v. Wadsley*, 3 B. & C. 357.

(*z*) *Harrison v. Allen*, 2 Bing. 4.

(*z*¹) [A new trial will be granted where

the damages are too small. *Bixey v. Ward*, 3 Rand. 52; *M'Kane v. Bonner*, 1 Bailey, 113; *Paytavin v. Winter*, 4 Miller (Louis.), 46; *Taunton Manuf. Co. v. Smith*, 9 Pick. 11. See *Howard v. Barnard*, 11 C. B. 653.]

(*a*) Tidd, 9th ed. 909; and see *Nichol v. Bestwick*, 28 L. J. Exch. 4; *Wilson v. Hicks*, 26 Ib. 242.

(*b*) Tidd, 9th ed. 909; *Neale v. Wyllie*, 3 B. & C. 533.

(*c*) *Hilton v. Fowler*, 5 Dowl. 312.

The jury cannot give larger damages than are laid in the declaration; and if judgment be entered for the excess, it is error. (*d*) But the plaintiff may cure a finding for the excess, by entering a *remittitur* of the surplus before judgment; (*e*) or he may amend his declaration, and have a new trial. (*f*) And a mere miscalculation on the face of the record, of the total or aggregate of the damages or costs recovered, will not avoid the judgment. (*g*)

(*d*) *Cheveley v. Morris*, 2 Bl. 1300.

(*e*) *Percival v. Spencer*, Yelv. 45; *Wray v. Lister*, 2 Str. 1110; [*Lewis v. Cooke*, 1 Harr. & M'Hen. 159; *Lambert v. Blackman*, 1 Blackf. 59; *Harris v. Jaffrey*, 3 Harr. & J. 543; *Allen v. Smith*, 7 Halst. 159.]

(*f*) *Tidd*, 9th ed. 896, and note (*k*).

(*g*) *Dunn v. Crump*, 3 B. & B. 300, 307. [As to the extent of the inquiry,

which may be made by the court of the jury to ascertain the ground and principle of their verdict, see *Pierce v. Woodward*, 6 Pick. 208; *Dorr v. Fenno*, 12 Pick. 526; *Parrott v. Thatcher*, 9 Pick. 426; *Hix v. Drury*, 5 Pick. 296; *State v. Haskell*, 6 N. H. 361; *Taylor v. Greely*, 3 Greenl. 204; *Spoor v. Spooner*, 12 Met. 281; *State v. Spencer*, 1 Zab. 196.]

CHAPTER VII.

PARTIES TO CONTRACTS.

SECTION I.

Of Parties in General.

[EVERY contract necessarily involves two parties : one bound to perform the contract, and the other entitled to have it performed. Number of parties.

By way of example ; in order to constitute a promissory note there must be both a promisor and a promisee. A note in which the maker promises to pay to himself, or to his own order, is not a promissory note, and contains no binding engagement. An instrument so drawn is incomplete, being in the nature of a conditional engagement, in case the maker should afterwards indorse the note, to pay it to the person to whom by such indorsement he should direct it to be paid ; if indorsed specially, it imports a promise to pay to the person to whom it is indorsed or his order ; if the maker indorses it in blank and circulates it, it becomes in effect payable to bearer. (*a*)

So a promissory note made payable nine months after date, “to the secretary for the time being” of a society, was held invalid, because it did not show a certain payee ; (*b*) and for the same reason a bill of exchange drawn payable six months after date, to the order of “the treasurer for the time being” of an institution, was held invalid ; (*c*) but a promissory note payable “to the trustees of the N. chapel or their treasurer for the time being,” was held valid ; the trustees being taken to be the payees, and the treasurer only their agent to receive payment. (*d*) An instrument in the form of a bill of exchange and accepted, but without the name of either drawer or payee, does not constitute a binding contract, though capable of being completed by adding the names of such parties. (*e*)

(*a*) *Brown v. De Winton*, 6 C. B. 336.

(*d*) *Holmes v. Jaques*, L. R. 1 Q. B.

(*b*) *Cowie v. Stirling*, 6 El. & Bl. 333 ; 376.

25 L. J. Q. B. 335.

(*e*) *M'Call v. Taylor*, 19 C. B. N. S.

(*c*) *Yates v. Nash*, 8 C. B. N. S. 581.

[An insurance office having two departments, one for insurance and the other for annuities, the latter department effected a policy of insurance with the former, upon the life of a person to whom a loan had been made, and who had covenanted to pay the premiums for insuring his life; it was held that the policy so made was a nullity, because made by the company with themselves, and that the debtor could not be charged with the premiums. (*f*) So, a covenant made by a person with himself and others jointly, to pay money on their joint account, was held void. (*g*)

Where a ship-owner carries his own goods in his own ship, there is no "freight," properly so called, because there can be no contract made by the ship-owner with himself in respect of the carriage. Hence, in such a case, the underwriters on a ship, upon abandonment of the ship as lost, having brought the goods to their destination, it was held that they had no claim upon the owner for freight in respect of the carriage of the goods to the place where the ship was lost, notwithstanding the rule that the abandonees of a ship are entitled to all the freight earned by it at the time of abandonment. (*h*) So, the mortgagee of a ship with the freight, on taking possession of the ship, cannot claim freight in respect of a cargo shipped by the owner, because the owner cannot contract with himself. (*i*)

Several persons may join in a contract on the one part or on the other; that is to say, in respect of the same debt or liability more persons than one may be joined in the character of *creditor* or promisee, or more persons than one in the character of *debtor* or promisor, or more persons than one in both characters. In such cases the persons jointly becoming party to the contract, though they may have several interests relatively to one another, are considered as united in interest relatively to the other party to the contract. Contracts of this kind are called *joint contracts* or *joint debts*; and the person composing the respective parties thereto are called *joint creditors* or joint promisees, and *joint debtors* or joint promisors.

If an obligation confer a joint right upon several covenantees, they must all join in an action founded upon it; (*i*¹) if it confer several rights, each must bring a separate action

301; and see *Stoessiger v. South Eastern Railway Co.* 2 El. & Bl. 549.

(*f*) *Grey v. Ellison*, 25 L. J. Ch. 666.

(*g*) *Faulkner v. Lowe*, 2 Exch. 595.

(*h*) *Miller v. Woodfall*, 8 El. & Bl. 493.

(*i*) See *Gumm v. Tyrie*, 4 B. & S. 68.

(*i*¹) *Feelestone v. Clipsham*, 1 Wms. Saund. 153; *Hatsall v. Griffith*, 2 Cr. &

[in reference to his own separate interest. But one and the same covenant cannot be both joint and several with the covenantees. (*l*) If, however, there be two different covenants in the same contract, one of them may be joint and the other several. (*m*)

upon covenants in deeds. (*k*)

In determining whether the right under a contract is joint or separate, attention must be paid to the nature of the interest of the covenantees in the contract, as well as to the language of the covenant; (*n*) for it is a settled rule of construction, that when the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may in its terms be several, or joint and several, and although one only of the covenantees may have a beneficial interest in the covenant, or the covenantees are interested in the covenant in unequal proportions. The words of severalty in such a case shall not prevail. (*o*) The reason as-

Mode of determining whether contract is joint or separate.

Reason.

M. 679; *Pugh v. Stringfield*, 3 C. B. N. S. 2; 4 Ib. 364; *Wetherell v. Langston*, 1 Exch. 634. As to the mode of taking advantage of a non-joinder, see *Petrie v. Bury*, 3 B. & C. 353; *Pugh v. Stringfield*, *supra*; *Chanter v. Leese*, 4 M. & W. 295.]

(*k*) In several recent cases in England the rules of construction applicable to covenants, as affecting the joinder or non-joinder of covenantees, have been much considered, and some expressions, at variance with each other, have been made by the courts of queen's bench and exchequer, in delivering their opinions with reference to this subject. The difference seems to have originated in a doubt suggested by Mr. Preston, in his edition of the Touchstone, with reference to the language of Gibbs C. J. in *James v. Emery*, 5 Price, 529; S. C. 8 Taunt. 245. It would be of very little avail to quote the language of the different courts which have entered into this apparent conflict of opinion. It is very doubtful whether it will lead to any practical difference in the determination of any case that may arise. The reader may consult these cases in the reports. *Sorsbie v. Park*, 12 M. & W. 146; *Foley v. Addenbrooke*, 4 Q. B. 197; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Bradburne*

v. Botfield, 14 M. & W. 559, 564, 572; *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 984; per Parke B. in *Wootton v. Steffenoni*, 12 M. & W. 134; *Harrold v. Whitaker*, 11 Ad. & El. (N. S.) 147, 161; *Keightly v. Watson*, 3 Exch. 716.

(*l*) Parke B. in *Bradburne v. Botfield*, 14 M. & W. 559, 572; Rolfe B. in *Keightly v. Watson*, 3 Exch. 716.

(*m*) Gibbs C. J. in *James v. Emery*, 8 Taunt. 245; S. C. 5 Price, 529; *Sharp v. Conklin*, 16 Vt. 354; *Duval v. Craig*, 2 Wheat. 45. See *Wall v. Hinds*, 4 Gray, 269, per Bigelow J.; *Calvert v. Bradley*, 18 How. (U. S.) 580.

(*n*) Harrold *v. Whitaker*, 11 Ad. & El. (N. S.) 161, per Lord Denman C. J. "The court must construe the covenant according to the interest, and according to the apparent meaning of the covenant itself; and this is in accordance with all the cases which will be found collected in the note to *Eccleston v. Clipsham*, 1 Wms. Saund. 155 a, note, adding to them *Bradburne v. Botfield*, 14 M. & W. 559."

(*o*) *Capen v. Barrows*, 1 Gray, 376, 379, per Metcalf J.; *Bradburne v. Botfield*, 14 M. & W. 559; *Servante v. James*, 10 B. & C. 413; *Eccleston v. Clipsham*, 1 Wms. Saund. 154, note (1); *Petrie v. Bury*, 3 B.

[signed why all should join is, that where the interest is joint, if

& C. 353; *Scott v. Godwin*, 1 B. & P. 67; *James v. Emery*, 8 Taunt. 245; S. C. 5 Price, 529; *Wakefield v. Brown*, 9 Ad. & El. (N. S.) 209; *Magnay v. Edwards*, 13 C. B. 479; *Pugh v. Stringfield*, 3 C. B. N. S. 2; *Bartlett v. Holbrook*, 1 Gray, 114. If covenantees *may* all join in a suit, they *must* join. They cannot choose for themselves whether they will sue jointly or severally. The question, who shall be plaintiffs? the law settles for them on the construction of their contract. See *Petrie v. Bury*, 3 B. & C. 353; Lord Denman C. J. in *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 208; *Slingsby's case*, 5 Co. 19 a; *James v. Emery*, 5 Price, 529; S. C. 8 Taunt. 245; *Spencer's case*, 5 Co. 16; *Spencer v. Durant*, Comb. 115; *Keightly v. Watson*, 3 Exch. 721, 723. If the interest be joint, a joint action must be brought. *Bradburne v. Botfield*, 14 M. & W. 559; *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 971; *Southcote v. Hoare*, 3 Taunt. 87; *Sweighart v. Berks*, 8 Serg. & R. 308; *Dob v. Halsey*, 16 John. 34; *Tapscott v. Williams*, 10 Ohio, 442; *Sims v. Harris*, 8 B. Mon. 55; *Hatsall v. Griffith*, 4 Tyrwh. 487. If an estate be granted to three persons jointly, and covenants for title are entered into with them, and "each of them," the covenants are joint, because they have a joint estate, and the words, with "each of them," are mere words of amplification. If, on the other hand, they take separate and distinct estates, and the covenant be in terms joint, they shall have separate actions, by reason of their separate interests. *Slingsby's case*, 5 Co. 18 b; *Windham's case*, 5 Co. 7 b; *James v. Emery*, 8 Taunt. 245; *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 207, 208; *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 964; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Southcote v. Hoare*, 3 Taunt. 87. In like manner, where a covenant was made to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, it was held that although the benefit to be derived from the perform-

ance of the covenant would inure to one only of the covenantees, yet both had a legal interest in the performance of it, and consequently, on the death of A., the right of action on the covenant survived to B. *Anderson v. Martindale*, 1 East, 497. See *Wakefield v. Brown*, 9 Ad. & El. (N. S.) 206. The principle, which governed the decisions in the preceding cases, was likewise applied by the court of queen's bench in that of *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 964 (recognized by Parke B. in *Bradburne v. Botfield*, 14 M. & W. 564), which will well illustrate the rule under consideration, and where the facts were as follows: By articles of agreement under seal between the defendant of the one part, and the plaintiff and A. of the other part, after reciting that the defendant, as solicitor of one B., had applied to the plaintiff to lend to B. a sum of 2,900*l.*, out of certain moneys of the said A., then in the plaintiff's hands in trust for A., on the security of certain stock in the funds, and the covenant thereafter contained; the defendant, in pursuance of the agreement, and in consideration of the premises, and of the plaintiff's having advanced 2,900*l.* to the said B., at the request of the defendant, did covenant with and to the plaintiff, his executors, &c., and also *as a separate and distinct covenant* with and to the said A., her executors, &c., that he the defendant, would pay to the plaintiff, his executors, &c., the regular interest on the 2,900*l.* It was held that notwithstanding the express words of severalty, the plaintiff could not sue upon the above covenant without joining A., the legal interest of the covenantees being joint. See *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 207. If a bond be made to three persons to pay money to one of them, all ought to join in an action on the bond, for they are as one obligee; and if he who is to receive the money dies, the other two who survive must bring the action, although they have no beneficial interest in the sum contained in the condition. The legal interest in this contract and in the cause of action thereon is, in

[several were permitted to bring several actions for one and the same cause, the court would be in doubt for which of them to give judgment. (*p*)

Where the covenant is in its terms expressly and positively joint, the covenantees must join in an action upon it, although as between themselves their interest is several. (*q*) But where the language of the covenant is capable of being so construed, it shall be taken to be joint or several, according to the interest of the covenantees. (*r*)

Joint covenant.

Joint or several, according to interest.

If the parties to the contract have a joint interest in the fulfilment thereof, and sustain a joint damage by the breach of the engagement they have entered into, they must all bring a joint action. (*s*)

Joint interest.

such case, joint only. *Capen v. Barrows*, 1 Gray, 381, per Metcalf J.; *Rolls v. Yate*, Yelv. (Metcalf's ed.) 177, n. (1); *Bulstrode*, 25; *Anderson v. Martindale*, 1 East, 497; *Burford v. Stuckey*, 5 Moore, 23; S. C. 2 B. & B. 333. In these cases, one of the covenantees has a sort of guardian over him in the person of the other, and there cannot be any separation of the interest for the purposes of action. *James v. Emery*, 5 Price, 534.

(*p*) Per Lord Kenyon C. J. in *Anderson v. Martindale*, 1 East, 501; 1 Chit. Pl. (9th Am. ed.) 9.

(*q*) *Bradburne v. Botfield*, 14 M. & W. 564, 573; *Harrold v. Whitaker*, 11 Ad. & El. (N. S.) 147, 171; *Capen v. Barrows*, 1 Gray, 579; *Broom on Parties*, 8; *Haughton v. Bayley*, 9 Ired. 337; *Sweighart v. Berks*, 8 Serg. & R. 308; *Sorsbie v. Park*, 12 M. & W. 146.

(*r*) *Sorsbie v. Park*, 12 M. & W. 146; *Evans v. Sanders*, 10 B. Mon. 291. "The result of the cases," observed Lord Denman C. J. in *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 207, "appears to be this, that where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be in joint terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay separate rents to tenants in com-

mon upon demises by them; or, as in the instance cited from *Slingsby's case*, 5 Co. 18 b, in note (1) to *Eccleston v. Clipsham*, 1 Wms. Saund. 155, where a man by indenture demised Blackacre to A., Whiteacre to B., and Greenacre to C., and covenanted with them, and each of them, that he had good title, each might maintain an action for his particular damage by a breach of that covenant." It follows from the above rule, that a covenant cannot by express words be made joint and several with the covenantees where their interests are several; neither can it be so, where their interest is joint, because the court will construe a covenant so worded as several or joint according to the legal interest of the covenantees. *Bradburne v. Botfield*, 14 M. & W. 573. In this case the question, whether one of several lessors, being tenants in common, can sue on a covenant to repair made with all, was expressly raised on demurrer, but was not decided, the court observing: "There is no decisive authority either way. That all *could sue* is perfectly clear," citing *Kitchen v. Breckley*, Sir T. Raym. 80; S. C. 1 Lev. 109; *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 208; *Wakefield v. Brown*, 9 Ad. & El. (N. S.) 209, 222, per Lord Denman C. J.

(*s*) *Wright v. Post*, 3 Conn. 142. Thus where there were covenants, not in terms either joint or several, in an indenture of

[A covenant with several persons for payment to them of a sum of money, is a joint covenant with all, in the performance of which they have a joint interest, so that one of them cannot sue for his particular share or proportion of the entirety, but all must join in one joint action for the whole, and the pointing out of the share, which each is to take of the entire amount, will not create a separation of interest so as to enable the parties to maintain separate actions. (t)]

Where one covenants with two or more persons using words which *primâ facie* import a joint covenant, but which nevertheless admit of being construed severally, then, if the interest and cause of action of each of the covenantees appear on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be con-

copartnership, that the partners should devote their whole time and attention to the business, and that all the purchases, sales, transactions, and accounts of the partnership should be kept in regular books, in an action against one of the parties for a breach of these covenants, all the other copartners must join. *Capen v. Barrows*, 1 Gray, 376, 379. In this case Metcalf J. said: "The covenants in suit, not being in terms either joint or several, are capable of being construed according to the interests of the covenantees. And their interest, legal and beneficial, is clearly joint and not several. They were copartners, and the interest of each is the same in kind and amount, and each is equally injured by a breach of those covenants. And the defendant ought not to be held liable to two actions for the same breach." See *Eccleston v. Clipsham*, 1 Wms. Saund. 153; S. C. 3 Keble, 338, 339, 347, 385; *Thimblethorpe v. Hardesty*, 7 Mod. 116; *Vesey v. Mantoll*, 9 M. & W. 323. In *Saunders v. Johnson*, Skin. 401; S. C. Comb. 230, and in *Spencer v. Durant*, Comb. 115, decisions were made similar to that in *Capen v. Barrows*, *ubi supra*.

(t) *Wall v. Hinds*, 4 Gray, 256. An action of debt was brought upon a covenant contained in an annuity deed, whereby the

defendant covenanted with the plaintiff and one A. B., their executors, administrators, and assigns, to pay to the plaintiff and the said A. B., and their executors, &c., one annuity or clear yearly sum of 30*l.*, in the shares and proportions following, *i. e.* the sum of 15*l.* being one moiety of the said annuity, or yearly sum, to the plaintiff, his executors, &c., and the sum of 15*l.*, the remaining moiety thereof, unto the said A. B., his executors, &c.; and it was held that the covenanters had a joint interest in one entire annuity, to be paid to them in moieties; that the words "in the shares and proportions following," only pointed out the mode of payment, and did not operate as a severance of interest, and that one of the covenantees consequently could not maintain an action without joining the other; *Lane v. Drinkwater*, 1 Cr., M. & R. 599; S. C. 5 Tyrwh. 40; *Byrne v. Fitzhugh*, 5 Tyrwh. 54; S. C. 1 Cr., M. & R. 613; *English v. Blundell*, 8 C. & P. 332; but if the deed had contained a distinct grant of a separate annuity to each of the two covenantees, then they would have had several interests, and it would have been necessary for them to have brought separate actions. *Withers v. Bircham*, 3 B. & C. 254. See *Carthrae v. Brown*, 3 Leigh, 98.

[strued to be a several covenant with each, and each covenantee may bring on an action for his own particular damage. (u)]

(u) Per Cur. *Lane v. Drinkwater*, 1 Cr., M. & R. 612; *Eccleston v. Clipsham*, 1 Wms. Saund. 154, note (1); *Servante v. James*, 10 B. & Cr. 410; *Windham's case*, 5 Co. 8 a; *James v. Emery*, 8 Taunt. 245; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Shaw v. Sherwood*, Cro. Eliz. 729; *Wilkinson v. Lloyd*, 2 Mod. 82; *Sharp v. Conklin*, 16 Vt. 354; *Jones v. Robinson*, 1 Exch. 454; *Palmer v. Sparshott*, 4 Man. & Gr. 137; *Boggs v. Curtin*, 10 Serg. & R. 211. See *Catlin v. Barnard*, 1 Aiken, 9. Where, therefore, a covenant, though joint in terms, was for the payment of an annuity to each of two persons, it was held that the interests of the covenantees were several, and that they should sue separately on the covenant. *Withers v. Bircham*, 3 B. & C. 254; *Lilly v. Hodges*, 8 Mod. 166. So where the covenant was with several for the payment of the purchase-money of an estate by instalments in equal portions, it was decided, that a party entitled to one such portion might sue alone on the covenant. *James v. Emery*, 8 Taunt. 245; S. C. 5 Price, 529. And where the defendant had covenanted with *Lilly & Cradoval* to receive the rents due to them in Ireland, and pay a moiety thereof to each of them, the said *Lilly & Cradoval*; it was held, that the covenant was several, and that a separate action might be brought by *Lilly* alone. *Lilly v. Hodges*, 8 Mod. 167; 1 Strange, 553; *Tippet v. Hawkey*, 3 Mod. 264; *Dunham v. Gillis*, 8 Mass. 462. These last two cases are both discredited in *Capen v. Barrows*, 1 Gray, 380, 381, but not to affect the point stated above. Certain articles of agreement were entered into between the master and the several part-owners of a vessel, who should execute the articles and their several and respective executors, &c., to pay to them a certain sum of money, to be received for the hire of the vessel, in such parts and proportions as were set against their several and respective names, which "parts and proportions" were regulated according to their several

shares in the ship; and it was held that the interests of the parties being several, a joint action brought against the master by all of them could not be sustained, but that each one of the covenantees must sue severally, in respect of his separate interest and estate. *Servante v. James*, 10 B. & C. 410. By articles of agreement reciting that the defendant had contracted with A., as agent for the plaintiff and others, for the purchase of certain lands at the several prices therein mentioned, the defendant covenanted with the plaintiff and the other parties beneficially interested, to perform such contract, by paying the purchase-money as agreed on, and it was held that the interest of the parties was clearly several, and that plaintiff might consequently sue alone for his share of the purchase-money, without joining the other parties, beneficially interested. *Poole v. Hill*, 6 M. & W. 835. Where the covenant is to several, for the performance of several duties to each, the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach as far as his own interest extends. Per Lord Kenyon C. J. in *Anderson v. Martindale*, 1 East, 501; *Slingsby's case*, 5 Co. 18; 1 Wms. Saund. 155, note (2); *Platt Covenants*, 126, 127. The severalty of interest must be disclosed upon the face of the deed, and there must be a manifest intention that a separate and distinct duty should arise to each one of the covenantees in respect of the thing covenanted to be done, to warrant the interpretation of the covenant as a several covenant; and, if within "the four corners of the deed" there is no distinct appearance of such severalty of interest, the covenant must be construed as a joint covenant and a joint action by all the covenantees must be brought upon it. *Sorsbie v. Park*, 12 M. & W. 156-158; *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 964.

[All covenants arising by construction and implication of law, are coextensive with the interest of the parties in whose favor they are created ; joint, if that interest is a joint interest, and if a several interest several. If, therefore, a landlord grants a lease to A., B., and C., the action upon the implied covenants for title and quiet enjoyment must be brought by all the lessees jointly, because they have a joint estate. (*v*)

If the separate and distinct estates and interests of tenants in common are disclosed on the face of a deed, and a separate duty is reserved to each in respect of his particular estate, and the damages are consequently in their nature severable, and apportionable according to the share of each, separate actions must be brought, although the terms of the covenant may be joint ; if, on the other hand, the deed contemplates the performance of one thing only, and of one duty, in favor of all, they must bring a joint action, though they be possessed of several estates. If two tenants in common make a lease, reserving one entire rent to themselves, they must bring a joint action to recover such rent, although the rent be reserved to them, "according to their several and respective rights and interests ;" (*w*) but if there be several demises, and a separate reservation of rent to each tenant in common, then they must bring separate actions. (*x*)

As all persons jointly interested must bring a joint action, it follows that one joint tenant cannot sue without joining the other in actions upon covenants affecting the enjoyment of their joint estate. (*y*) But if, in express contracts respecting their joint property, covenants are entered into with one of them alone for the payment of rent, or the performance of certain services, such covenantee may alone sue. And when express cov-

(*v*) *Coleman v. Sherwin*, 1 Salk. 137 ; *sever at their election, in an action upon the covenants. Midgley v. Lovelace*, S. C. Comb. 163.

(*w*) *Wall v. Hinds*, 4 Gray, 256. See *Carth.* 289 ; *Kitchin v. Buckley*, 1 Lev. 109 ; *T. Raym.* 80. If a person tortiously takes wood from the land of tenants in common, and sells it for money, and the tenants in common elect to waive the tort and sue for the money, they must do so in their joint names. *Gilmore v. Wilbur*, 12 B. & Ald. 850.

(*x*) *Litt.* s. 316 ; *Simpson v. Clayton*, 4 Bing. (N. C.) 781 ; *S. C.* 6 Scott, 496 ; *Powis v. Smith*, 1 Dowl. & R. 490 ; *S. C.* 5 B. & Ald. 850 ; *Wallace v. M'Laren*, 1 M. & R. 516. But when an estate in land with covenants annexed comes to two persons as tenants in common, they may, in certain cases, it has been held, join or

(*y*) *Co. Litt.* 214 a, 180 ; *De Charms v. Harwood*, 10 Bing. 529 ; *S. C.* 4 Moore & Sc. 400.

[tenants are entered into by tenants in common, joint tenants or par-ceners *inter se*, such covenants are either joint or several, according as they contemplate the fulfilment of one joint duty to all, exclusive of the covenantor, or the fulfilment of distinct and separate duties in favor of each one of the covenantees. (z)]

If, upon the face of a simple contract in writing, it appears that the promisees have a joint legal interest in the performance of the contract and sustain a joint damage, by reason of its non-fulfilment, they must bring a joint action; even though the contract be in terms several, or be entered into with one person only in behalf of all. (a) If, on the other hand, they take several interests, and separate duties and engagements arise in favor of each, and the damages consequently are several, and can be apportioned, separate actions must be brought. (b) But the surrounding circumstances, and the situation of the parties, and the nature of the consideration, (c) may be looked at, in order to see who is really interested, and who has sustained the damages, and whether such damages are joint or several, in order to determine the number of the plaintiffs, and in whom the right of action vests. (d)

Of joint and separate rights upon simple contracts.

(z) *Wotton v. Cooke*, Dyer, 260 b.

(a) *Chanter v. Leese*, 4 M. & W. 295; S. C. 5 M. & W. 698; *Coryton v. Lithebye*, 2 Wms. Saund. 116, note (2); *Owston v. Ogle*, 13 East, 538; *Hill v. Tucker*, 1 Taunt. 7; *Townsend v. Neal*, 2 Camp. 190; Com. Dig. Abatement (E. 12); *Fishmonger's Co. v. Staines*, 6 Scott N. R. 120; *Lucas v. Beale*, 4 Eng. Law & Eq. 35; *Calvert v. Bradley*, 16 How. (U. S.) 580.

(b) *Palmer v. Sparshott*, 4 Scott N. R. 743; *Seaton v. Booth*, 4 Ad. & El. 528; *Hall v. Leigh*, 8 Cranch, 51.

(c) *Chanter v. Leese*, 5 M. & W. 698, 701; *Evans v. Draper*, 1 Roll. Abr. 31, Pl. 9; *Winterstoke Hundred's case*, Dyer, 370 a; *Bell v. Chaplain*, Hardr. 321; *Coryton v. Lithebye*, 2 Wms. Saund. 116 a, note (2).

(d) *Place v. Delegal*, 4 Bing. (N. C.) 426; *Windham's case*, 5 Co. 7. An agreement was entered into between the several part-owners of a vessel, who had separate shares in the ship, and the defendant, whereby the defendant was intrusted with

the exclusive management and control of the vessel, as ship's husband, for a voyage, and the defendant was to fit out the vessel and supply her with the necessary stores for a voyage, and each of the parties, part-owners of the vessel, was to pay the defendant "a proportion" of the sums he should expend in that behalf, and the defendant promised, after the voyage had been completed, to render a full account of the ship and her concerns, and to divide the net profits "according to the proportions in the said ship;" and it was held, that, as the promisees had upon the face of the written contract several interests in the performance of the thing stipulated to be done, and each sustained a separate damage, the promise to account should be moulded according to the several interests of the parties, and be a distinct promise to each in respect of his separate share in the ship, and that any of the part-owners, consequently, might maintain a separate action for the non-render of the account. *Owston v. Ogle*, 13 East, 538.

If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares in the subject-matter of the contract. (*e*)

If in consideration of certain services to be rendered by the promisees, a promise is made to pay them a sum of money, this is a joint promise in favor of all, upon which a joint action by all must be brought; and the pointing out the particular share that each is to receive of the sum so promised to be paid, will not, in the case of simple contracts, any more than in the case of deeds, create a severance of interests, so as to enable the promisees to maintain separate actions against the promisor, to recover their respective proportions of the entirety. (*f*)

(*e*) The plaintiff and two others, being possessed of separate shares in a ship, jointly employed the defendant to sell the entirety for them; and it was held that the plaintiff could not sue the defendant for his separate share of the purchase-money; for, as the employment was to sell the ship *in solido* as one thing for all, the proceeds became joint property, and nothing less than an express agreement by the defendant, with the consent of all parties, would have enabled the plaintiff to maintain a separate action. But if each had employed the defendant to sell his separate share in the ship, then separate actions might have been brought by each. *Hatsall v. Griffith*, 2 Cr. & M. 679; S. C. 4 Tyrwh. 437; *Break v. Douglas*, cited by Parke B. in 2 Cr. & M. 681; *Graham v. Robertson*, 2 T. R. 282. Two persons, who had become bail for another, called together upon an attorney, and employed him to surrender their principal; it was held that one of them could not afterwards maintain an action against the attorney for neglecting to effect the surrender pursuant to their undertaking, as the retainer was a joint retainer, and the law would therefore consider the undertaking to be a joint undertaking to both, upon which

both must sue. *Hill v. Tucker*, 1 Taunt. 7. So where the several cattle of A. and B. were distrained, and C. in consideration of 10*l.*, to him paid by A. and B. jointly, promised to procure the redelivery of the cattle, but failed in so doing; one joint action was held to lie at the suit of A. and B., the consideration being entire, individual, and joint. *Ivans v. Draper*, 1 Roll. Abr. 31, Pl. 9; *Bac. Abr.* Actions in General (*c*); *Coryton v. Lithebye*, 2 Wms. Saund. 116 a, note (2); *Styles*, 156, 157, 203. It did not appear in the above case, how many cattle the one party had lost and how many the other, the damage, therefore, was a joint damage to both, and compensation was properly sought for in a joint action.

(*f*) *Byrne v. Fitzhugh*, 1 Cr., M. & R. 597, note (*a*); S. C. 5 Tyrwh. 54. When the payment is in the first place of one sum *in solido*, and this is afterwards to be divided among the promisees, there, generally, the interest of the promisees is joint. *Lane v. Drinkwater*, 5 Tyrwh. 40. Where a handbill was issued, offering a reward of 100*l.* for the recovery of a stolen parcel, and containing these words, "whoever will give such information as will lead to the immediate recovery of the above par-

[But, if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then separate actions must be brought. (g) In all actions upon implied promises and contracts, the number of plaintiffs, and the joint and separate cause of ^{Implied} promises. action, depend entirely upon the nature of the consideration, from which the implied promise arises. (h) If that consideration moves from several persons jointly, the law raises a corresponding implied promise in favor of all, upon which all may sue; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favor of each, and separate actions must be brought. If several persons are employed upon a joint retainer to do certain work, or perform certain services, there is an implied joint promise of remuneration; but if the parties each receive separate retainers, and each contrib-

cel, with its contents safe if lost, or the early apprehension of the guilty parties if stolen, shall receive the above reward," the court observed that according to the true construction of this advertisement, the information must be given with a view to its being acted on, either to the person offering the reward or to his agent, or some person having authority by law to apprehend the criminal; and it appearing that the first communication was made by the plaintiff to C. in the course of conversation, but that the information that led to the apprehension of the guilty party was communicated to a constable by the plaintiff and C. jointly, it was held that they ought both jointly to have brought the action for the recovery of the reward. *Lockhart v. Banvard*, 14 M. & W. 674. Where an order of reference named two arbitrators, and gave them power to nominate an umpire, and they, in the first place proceeded to nominate a third party: held, that an action lay at the suit of the three referees, for the costs of the award against the defendants, who had promised to pay them such costs. *Hoggins v. Gordon*, 3 Q. B. 466.

(g) Thus, where the defendant promised one Thomas that in consideration he would surrender a copyhold to the defendant,

he, the defendant, would give unto his (Thomas's) two daughters 20*l.* apiece, one of the daughters, having brought her action for a breach of this promise, it was moved in arrest of judgment, that it was a joint promise to the two daughters, and that the one could not maintain a separate action; but per Glyn C. J. "the law doth distinguish the interest though the promise be joint. The action is brought for one twenty pound due to one of the daughters; the parties have distinct interests, so every one of them may bring the action." *Thomas v. —*, Styles, 461. See *Carthrae v. Brown*, 3 Leigh, 98; *Hall v. Leigh*, 8 Cranch, 50.

(h) *Gibson J. in Boggs v. Curtin*, 10 Serg. & R. 211; *Gilmore v. Wilbur*, 12 Pick. 120. If two joint owners of merchandise consign it to a merchant for sale, and inform him that each one owns one moiety, and give separate and distinct instructions, each for his own moiety, it will be treated as a several contract, and one of the consignors alone may maintain a separate action against the consignee for a violation of his instructions. *Hall v. Leigh*, 8 Cranch, 51. See *Story v. Richardson*, 6 Bing. N. C. 123; *Hatsall v. Griffith*, 2 Cr. & M. 679.

[utes a separate portion of the work, and separate services, independently of the rest, the law implies corresponding several promises. (*i*) Out of one joint retainer, also, may arise one entire duty in favor of all, and separate duties to each one of the employers, in respect of which a separate action must be brought; (*j*) and a retainer originally joint may become several, and give rise to separate causes of action, by reason of the subsequent conduct of the

Implied
promises in
respect of
money paid,
lent, or re-
ceived.

contracting parties. (*k*) If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of repayment in favor of all; but if several sums be advanced separately by each, the law implies a corresponding separate promise in favor of each. (*l*) And although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum *in solido*, the implied promise of repayment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto. (*m*) If several persons contribute their several proportions of a sum of money, which is to be paid under a special contract to which they are parties, and the money is advanced as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to refund the

(*i*) *Bell v. Chaplain*, Hardr. 321. A carrier, being in want of assistance on the road, engaged two persons separately to assist him with their horses. Each sent three horses with a carter to attend them, and the six drew the wagon, and they were directed to send in their *several* accounts. The two brought a joint action for the hire, but it was held not to be maintainable, as they had no joint interest. *Smith v. Hunt*, 2 Chitty, 142.

(*j*) *Story v. Richardson*, 6 Bing. N. C. 130; *Peckham v. North Parish in Haverhill*, 16 Pick. 274.

(*k*) *Garrett v. Taylor*, 1 Esp. 117.

(*l*) *Brand v. Boulcott*, 3 Bos. & Pul. 235. Two out of three joint contractors, against whom judgment had been recovered, borrowed a sum of money upon their credit to satisfy the judgment; and it was held that they might maintain a joint action upon the implied promise of contribution against the third; but if each had

contributed his share of the money out of his own funds, or had borrowed it on his separate credit, then the law would have implied a separate promise in favor of each, upon which separate actions must have been brought. *Osborne v. Harper*, 5 East, 225, 229. See *Winterstoke Hundred's case*, Dyer, 370 a, pl. 59; *Kelley v. Steel*, 5 Esp. N. P. C. 192; *Place v. Delegal*, 4 Bing. N. C. 426; *Palmer v. Sparshott*, 4 Scott N. R. 743; *Pearson v. Parker*, 3 N. H. 366; *Boggs v. Curtin*, 10 Serg. & R. 211; *Jewett v. Cornforth*, 3 Greenl. 107. The contract of contribution is a several contract. *Kelley v. Steel*, *ubi supra*; *Graham v. Robertson*, 2 T. R. 282; *Parker v. Ellis*, 2 Sandf. (Sup. Ct.) 223. A surety who has paid the debt may release one of his co-sureties without barring his right of action against the rest. *Crowden v. Shelby*, 6 J. J. Marsh. 61; *Fletcher v. Grover*, 11 N. H. 368.

(*m*) *May v. May*, 1 C. & P. 44.

[money arises in favor of all. (n) It follows from the rule already stated, as to the joinder of parties in actions upon parol contracts, that a party, having *no* legal interest in the cause of action, cannot join in suing with one who has such interest. (o) It is likewise a consequence of the preceding rules that, when a contract may be treated either as joint or as several, either all must join, or each sue alone in respect of his several interest; and where one of several persons, who have a joint right of action, dies, the right then vests in the survivors to the exclusion of the personal representatives of the deceased. (p) A release of a debt, or of a claim for damages by one of several joint creditors, is in law a discharge of the debt. (q)

Party having *no* legal interest.

Where contract may be treated as joint or as several, either all must join, or each sue alone.

Where a special contract or obligation is entered into by several, it must be either joint, joint and several, or several. (r) If expressly joint, all parties chargeable who are resident within the jurisdiction of the court, should be made defendants in an action for the breach of such contract; (s) but where the contract is in terms joint and several, the covenantee may elect to sue either one or

Of joint and several liabilities, where contract or obligation is entered into by several.

(n) *English v. Blundell*, 8 C. & P. 332. See *Graham and Robertson*, 2 T. R. 282.

(o) See *Betteley v. Reed*, 4 Ad. & El. (N. S.) 511.

(p) *Jones v. Yates*, 9 B. & C. 532, 538; *Rolls v. Yate*, Yelv. 177; *Anderson v. Martindale*, 1 East, 279; *Martin v. Crump*, Lord Raym. 340; *Scott v. Godwin*, 1 Bos. & P. 74; 1 Wms. Saund. 154, note (1).

(q) Bac. Abr. Release (D.); *Murray v. Blatchford*, 1 Wend. 583; *Decker v. Livingston*, 15 John. 479; *Pierson v. Hooker*, 3 John. 68; *Bulkley v. Dayton*, 14 John. 387; *Smith v. Stone*, 4 Gill & J. 310; *Collyer-Partn. (Perkins's ed.)* § 468.

(r) See *Platt Covenants*, 117-121.

(s) *Cabell v. Vaughan*, 1 Wms. Saund. 291 b, note (4). If one is sued alone he may plead in abatement of the writ, that is, that the debt was due, or the promise was made by him, jointly with another or others, who is or are still living and resident within the jurisdiction of the court, and not by himself alone. But that is the only mode in which he can object to

being charged separately; and if he pleads to the merits of the claim, as by plea of *non est factum* or *non assumpsit*, or the like, he cannot raise any valid objection on the ground of others being jointly liable with him. *Shep. Touch.* 376. "By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint." *Abbott J. in Richards v. Heather*, 1 B. & Ald. 29, 35; *Price v. Shute*, 5 Burr. 2613, was a case upon a simple contract, and it was there held that although the promise was a joint promise, yet the defendant, who was sued alone, could not say that he did not promise; and that the only way of taking advantage of the omission of the other joint contractor was by plea in abatement. Proof of a joint contract is sufficient to sustain an allegation that one contracted, and, therefore, there is no variance. Hence, each party to a joint contract is severally liable, in the sense that if sued severally, and he does not plead in abatement, he becomes liable to the cred-

[all of the covenantors, notwithstanding their legal interest in the subject-matter of the covenant be joint. (*t*) On a joint and several covenant or contract, the plaintiff must elect to proceed, either as if the contract or obligatory part of the instrument were joint, or as if it were several; so that the parties chargeable must be sued jointly or individually; (*u*) and in the former case, the personal representatives of a deceased contracting party must not be joined, nor need the survivors be declared against as such. (*v*) If the contract be several in its terms, each covenantor or obligor is, of course, separately liable, and must be separately sued; for, at law, as well as (generally speaking) in equity, the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situations. (*w*)

On a written agreement, the plaintiff can only sue the defendants in the manner in which they have made themselves liable, (*x*) and if there be any difficulty in determining the proper parties to be sued, such difficulty must arise from an ambiguity in the particular instrument, on which the liability is sought to be established, and which must be construed by the court. (*y*)

On a verbal contract, however, it is often a question of great nicety, whether the particular liability be joint or several, for this depends upon the evidence adduced, the effect of which must be left to the consideration of the jury. (*z*) It is not enough to show that credit was given to several persons jointly, without some proof of their contracting jointly, either ex-

itor for the entire debt. *Abbot v. Smith*, 2 W. Bl. 947; *King v. Hoare*, 13 M. & W. 494; *Cross v. Williams*, 7 H. & N. 675; *Mountstephen v. Brooke*, 1 B. & Ald. 224. The plea in abatement of the non-joinder of a joint contractor cannot be sustained, where the alleged joint contractor is dead, or where he is not resident within the jurisdiction, or where he has been discharged from the debt by proceedings in bankruptcy or insolvency, or where he was an infant at the time of contracting, and has since avoided the contract, or where the debt is barred as against him by the statute of limitations. See *Bullen v. Leake*, *Prec. Pl.* (2d ed.) 411, 412.

(*t*) *Eccleston v. Clipsham*, 1 Wms. Saund. 154, note (1).

(*u*) *Cabell v. Vaughan*, 1 Wms. Saund. 291 e; *Com. Dig. Obligation* (g); *Bac. Abr. Obligation* (D. 4), *Covenant* (D.); *Buller J. in Streathfield v. Halliday*, 3 T. R. 782; *De Ridder v. Schermerhorn*, 10 Barb. 640.

(*v*) *Bac. Abr. Obligation* (D. 4); 1 Wms. Saund. 153, note (1); *Engs v. Donnithorne*, 2 Burr. 1196.

(*w*) *Birkley v. Presgrave*, 1 East, 226; *Smith v. Pocklington*, 1 Cr. & Jerv. 445.

(*x*) *Lord Denman C. J. in Lee v. Nixon*, 1 Ad. & El. 207, 208.

(*y*) *Collins v. Prosser*, 1 Barn. & Cr. 682; *Lee v. Nixon*, 1 Ad. & El. 201.

(*z*) See *Kirby v. Barrister*, 5 B. & Ad. 1069; *Brown v. Doyle*, 3 Camp. 51.

[pressly or impliedly, (a) or that the work done was for their joint benefit. (b)

It may be laid down as a general rule, that if several persons agree to perform a particular act, they are bound jointly and not severally, in the absence of express words creating a several liability. (c) If two or more persons, for example, covenant generally for themselves without any words of severance, that they or one of them, shall do or perform a particular act, a joint charge is created. (d) If three are bound by these words, "we bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly" makes the obligation joint, which the word "each" cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the thing contracted to be done. (e)

If one of the co-contractors was an infant at the time of making the contract, and has not since the attainment of his majority, and before the commencement of the action, (f) ratified the contract, he ought not, by the law as held in England, to be made a co-defendant. For, if he be joined in the action, and plead his infancy, the plaintiff cannot, according to the English cases, enter a *nolle prosequi* as to him, and proceed against the other, as is allowed by statute in cases of bankruptcy; but he must discontinue the action, and commence a new action against the adult defendant alone, he being the sole contracting party, according to the legal effect of such a contract. (g) But a different rule prevails in some, at least, of the United States, where it is held, that if several are sued and one of them pleads infancy, the plaintiff may enter a *nolle prosequi* against the infant, and proceed to judgment against the other defendants. (h) So also, the plain-

One of the joint contractors an infant.

(a) Eaden *v.* Titchmarsh, 1 Ad. & El. 691, 694; Malkin *v.* Wickerstaff, 3 B. & Ald. 89; Lanchester *v.* Tricker, 1 Bing. 201; Northwaite *v.* Bennett, 1 Cr. & M. 316; Massey *v.* Knowles, 2 Stark. 65; Leigh *v.* Taylor, 7 B. & Cr. 491.

(b) Hellings *v.* Gregory, 1 C. & P. 627.

(c) Foster *v.* Taylor, 3 Camp. 49, 51, note; Hussey *v.* Crickett, 3 Camp. 168; Wathen *v.* Sandys, 2 Camp. 640; London

Gas Co. *v.* Nichols, 2 C. & P. 365; Marshall *v.* Smith, 15 Maine, 17.

(d) Bac. Abr. Tit. Obligations.

(e) 1 Wms. Saund. 291 b, note (4).

(f) Thornton *v.* Illingworth, 2 B. & C. 824.

(g) Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Trebain, 5 Esp. 47; Burgess *v.* Merrill, 4 Taunt. 468.

(h) Hartness *v.* Thompson, 5 John. 160; Woodward *v.* Newhall, 1 Pick. 500; Cutts *v.* Gordon, 13 Maine, 474; Tappan *v.*

[tiff may enter a *nolle prosequi* against one of several defendants, who gives his infancy in evidence under the general issue, or if the defendant does not enter a *nolle prosequi*, the jury may find a verdict for the infant, and for the plaintiff against the other defendants. (*i*)

Where the debt is joint only, a judgment against one joint contractor would be a bar to an action against another; because the latter might plead that he made no promise except with the former. (*j*)

“Each party to a joint contract is severally liable, in one sense, *i. e.* if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect composes the joint bond of all and the several bonds of each of the obligees.” (*k*)

If two or more persons, who have joined together in a contract “covenant severally” or become “severally bound,” it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate deed on the same paper. A joint action cannot, consequently, be maintained against the parties to such a contract, (*l*) but each must be sued separately upon the separate contract made by each. But in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it. (*m*)

Abbott, cited 1 Pick. 502. See *Judson v. Gibbons*, 5 Wend. 228, 229; *Morton v. Croghan*, 20 John. 106; *Tuttle v. Cooper*, 10 Pick. 288, 291, 292.

(*i*) *Cutts v. Gordon*, 13 Maine. 474; *Hartness v. Thompson*, 5 John. 160; *Walmsley v. Lindenberg*, 2 Rand. 478. An adult defendant cannot plead in abatement the infancy of a co-defendant. *Hallam v. Mumford*, 1 Root, 58.

(*j*) *King v. Hoare*, 13 M. & W. 494; *Maule J.* in *Bell v. Bankes*, 3 M. & Gr. 267; *Bayley J.* in *Lechmere v. Fletcher*, 1 Cr. & M. 634; *Story J.* in *U. S. v. Cush-*

man, 2 Sumner, 437-441; *Trafton v. U. S.* 3 Story, 646; *Pierce v. Kearney*, 5 Hill, 86; *Ward v. Johnson*, 13 Mass. 151, 152; *Robertson v. Smith*, 18 John. 459; *Moale v. Hollins*, 11 Gill & J. 11; *Ward v. Motter*, 2 Rob. (Va.) 559, 560.

(*k*) *Parke B.* in *King v. Hoare*, 13 M. & W. 515.

(*l*) *Elliott v. Davis*, 2 Bos. & Pull. 339; *Mathewson's case*, 5 Co. 33 a; *Mathewson v. Lydiate*, Cro. Eliz. 408, 470; *Lee v. Nixon*, 1 Ad. & El. 201.

(*m*) *Peckham v. North Parish in Haverhill*, 16 Pick. 283, 284, per *Wilde J.*; *Col-*

[The rule, that covenants are to be treated as joint or several, according to the interest of the parties in the subject-matter of the contract, relates only to the parties suing, not to the parties sued. If two persons covenant jointly and severally with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject-matter of the covenant be joint. (*n*) A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant. (*o*)

Joint and
several con-
tracts.

If several persons enter into a joint bond, or other contract, and in the obligatory part make use of the pronoun *I* instead of *we*, they are jointly and severally bound. A bond running thus: "I bind myself, my heirs, executors, and administrators, by these presents, sealed with our seals," executed by three persons, is a joint and several contract. (*p*) So where a promissory note, signed by two persons, began, "I promise to pay," it was held that it must be taken to be joint and several. (*q*) A note beginning in the singular "I promise," and signed by one partner for his copartners, is the joint note of all. (*r*)

Where three persons agreed to refer certain matters in dispute between them to arbitrators, and "jointly and severally" promised to perform the award, and the arbitrators awarded, that two of them should pay a sum of money to the third, and settled and directed the amount that was to be paid by each, it was held, that each was liable for the whole amount as well as for his individual share. (*s*)

It has been held, that if a party of friends dine together at a

lins v. Prosser, 1 B. & C. 682. "Two or more covenantors or promisors may make a contract, consisting of distinct stipulations, as to some of which they may covenant or promise jointly, and as to others separately." *Wilde J.* in 16 Pick. 283, 284.

(*n*) 1 Wms. Saund. 154, note (1); *Enys v. Dennithorne*, 2 Burr. 1190.

(*o*) *May v. Woodward*, Freem. 248; *Robinson v. Walker*, 7 Mod. 54; 1 Salk. 393; *Bolton v. Lee*, 2 Lev. 56; *Lilley v. Hodges*, 8 Mod. 106; *Northumberland v. Errington*, 5 T. R. 522.

(*p*) *Sayer v. Chaytor*, 1 Lutwych, 696;

Galway v. Mathew, 1 Camp. 403; S. C. 10 East, 264.

(*q*) See *March v. Ward*, Peake, 177; *Clark v. Blackstock*, Holt, 474; *Hall v. Smith*, 1 B. & C. 409, overruled in *Ex parte Buckley*, 14 M. & W. 469; *Hemmenway v. Stone*, 7 Mass. 58; *Van Alstyne v. Van Slyck*, 10 Barb. 387. A joint and several promissory note by several makers is equivalent to a joint note, and as many distinct separate notes as there are makers. *Beecham v. Smith*, El., Bl. & El. 442.

(*r*) *Doty v. Smith*, 11 John. 543; *Byles' Bills* (6th Eng. ed.), 6; *Buckley, ex parte*, 14 M. & W. 473.

(*s*) *Mansell v. Burreddge*, 7 T. R. 352.

[tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary. (*t*)

If two persons join in giving a written order for an undivided parcel of goods, they are generally to be held liable jointly for the price of them. (*u*) But such an order will not render them jointly liable, if it appear upon the whole of the transaction, that the seller intended to accept, and the purchasers to give, their several responsibility only. (*v*) In case two persons separately employ an agent to purchase goods for their separate use and consumption, and he goes into the market and purchases in one lot, the employers are not jointly responsible for the payment of the purchase-money. (*w*)

If one of several joint contractors dies, the survivors must be sued to the exclusion of the personal representatives of the deceased; (*w*¹) but if the contract be joint and several, the action may be brought either against the personal representative or the survivors. (*x*) Should a release be granted to one joint contractor, all will be released; and where persons are jointly and *severally* bound for the performance of a single act or duty, a release thereof as to one will operate as a release to all. (*y*) But a contract not to

(*t*) *Forster v. Taylor*, 3 Camp. 49; Roll. Ab. 24, 31. But see *Tileston v. Nettleton*, 6 Pick. 509.

(*u*) *Germain v. Frederick*, 1 Wms. Saund. 291 c. Where one contracts, in writing, with three persons, to give a bill of sale of two thirds of a vessel to two of them, and one third to the other, and in pursuance of the contract does convey two thirds, this is not a severance of the cause of action, and a suit may be maintained for the price against the whole. *Marshall v. Smith*, 15 Maine, 17.

(*v*) *Gibson v. Lupton*, 9 Bing. 297. See *Hopkins v. Smith*, 11 John. 161.

(*w*) *Hoare v. Dawes*, Doug. 371; *Coope v. Eyre*, 1 H. Bl. 37.

(*w*¹) Consequently the whole liability ultimately devolved upon the last surviving contractor, and, after his death, upon his representatives. See *Shep. Touch.* by *Preston*, 376; *Richards v. Heather*, 1 B. & Ald. 29; *Calder v. Rutherford*, 3 B. & B. 302. A release made to the executor

of one of joint obligors is inoperative, because upon the death of the one the debt survived against the others. *Ashbee v. Pidduck*, 1 M. & W. 564.

(*x*) *Tower v. Moor*, 2 Vern. 99; *May v. Woodward*, Freem. 248; *Enys v. Donnithorne*, 2 Burr. 1190; Bac. Abr. Obligation (D.); *Foster v. Hooper*, 2 Mass. 572; *Waters v. Riley*, 2 H. & Gill, 305; *Yorks v. Peck*, 14 Barb. 648.

(*y*) *Hammond v. Roll*, March, 202; *Cheetham v. Ward*, 1 Bos. & Pul. 633; *Nicholson v. Revill*, 4 Ad. & El. 683; *Cocks v. Nash*, 4 M. & S. 162; S. C. 9 Bing. 348; *Brooks v. Stuart*, 9 Ad. & El. 854; *Lunt v. Stevens*, 24 Maine, 584; *Collyer Part.* (Perkins's ed.) § 606; *Walker v. McCulloch*, 4 Greenl. 421; *Collins v. Prosser*, 1 B. & C. 682; *Wiggin v. Tudor*, 23 Pick. 444. But, in the United States, it must be a technical release under seal. *Shaw v. Pratt*, 22 Pick. 308; *Harrison v. Close*, 2 John. 449. But if one of several joint obligors or debtors be discharged by

sue one of two joint and several contractors will not operate as a release of both; (z) nor will a judgment recovered against one of them operate as a discharge to the other. (a) A release of one of two several obligors would not release the other. (b)

SECTION II.

Of Parties by Assignment.

The common law, in times past, assumed that, for avoiding maintenance, a *chose in action* could not be assigned or granted over to another. (c) And it is now a well settled rule of the common law, that simple contracts, and all covenants and obligations of a personal nature, being *choses in action*, are not assignable so as to entitle the assignee, against the consent of the debtor, to sue on them in his own name. (d)

operation of law, without the consent of the obligee or creditor, and by no act of his, it will not take away his remedy against the others. *Ward v. Johnson*, 13 Mass. 152; *Robertson v. Smith*, 18 John. 459; *Tooker v. Bennett*, 3 Caines, 4; *Hosack v. Rogers*, 8 Paige, 229; *Townsend v. Riddle*, 2 N. H. 449.

(z) *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Tuckerman v. Newhall*, 17 Mass. 532; *Rowley v. Stoddard*, 7 John. 210; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Couch v. Mills*, 21 Wend. 424. See *Brooks v. Stuart*, 8 Ad. & El. 854; *Solly v. Forbes*, 2 B. & B. 46; *McAllester v. Sprague*, 34 Maine, 236.

(a) *United States v. Cushman*, 2 Sumner, 310; *Trafton v. United States*, 3 Story, 646; *Simonds v. Center*, 6 Mass. 18; *Gratz v. Stump*, Cooke, 494; *King v. Hoare*, 13 M. & W. 494; *Higgen's case*, 6 Co. 44-46. "In such cases," Mr. Justice Wilde observed, in *Ward v. Johnson*, 13 Mass. 151, "the separate judgments amount in substance to the same as a joint judgment against all the promisors. In both cases each defendant is liable for the whole debt, and payment by one will discharge the

others." In *Trafton v. United States*, *ubi supra*, Mr. Justice Story proceeded further, and held that, where a contract is both joint and several, a judgment against both joint contractors is not a bar to a several action against either one of them; and a several judgment against either is not a bar to a joint judgment against both. *United States v. Cushman*, 2 Sumner, 426. But see *Ex parte Rowlandson*, 3 P. Wms. 405; *Cabell v. Vaughan*, 1 Wms. Saund. 291 f; *King v. Hobbs*, Metcalf's Yelv. 26, 27, note (1).

(b) Bac. Abr. Obligation (g).

(c) *Cushing J.* in *Pitts v. Holmes*, 10 Cush. 96; *Coolidge v. Ruggles*, 15 Mass. 387, 388; *Greenby v. Wilcocks*, 2 John. 1; *Co. Litt.* 214 a, 266 a; *Wilde J.* in *Sprague v. Baker*, 17 Mass. 589; *Parker v. Wise*, 6 M. & Sel. 239; *Thompson v. Doming*, 14 M. & W. 403; *Jones v. Carter*, 8 Q. B. 134.

(d) *Clark v. Swift*, 3 Met. 392; *Skinner v. Somes*, 14 Mass. 107; *Mosher v. Allen*, 16 Mass. 451. But "a *chose in action* vested in the king is assignable at law." *Abbott C. J.* in *Lambert v. Taylor*, 4 B. & C. 138. An assignment to the king empowers the assignee to sue in his own

Choses in action not assignable at law.

[But this rule interposes a formal difficulty only. (e) The assignment of a *chose in action* is valid in equity, and Assignable in equity. courts of law will take notice of equitable assignments and will protect them; (f) and will allow the assignee to maintain an action thereon in the name of the assignor. (f¹)

name. So of an assignment by the king. Bac. Abr. Prerogative (E. 3); McLean J. in *United States v. Buford*, 3 Peters (U. S.), 30; and, in this last case, it was said: "No valid objection is perceived against giving the same effect to an assignment to the government in this country."

(e) *Sprague v. Baker*, 17 Mass. 589; *Master v. Miller*, 4 T. R. 340; *Dewey J.* in *Gibson v. Cooke*, 20 Pick. 17.

(f) *Shaw C. J.* in *Palmer v. Merrill*, 6 Cush. 286; *Buller J.* in *Master v. Miller*, 4 T. R. 340; *Sprague v. Baker*, 17 Mass. 589; *Putnam J.* in *Gardner v. Hoeg*, 18 Pick. 170; *Shaw C. J.* in *Osborne v. Jordan*, 3 Gray, 277; *Westoby v. Day*, 2 El. & Bl. 605; *Dix v. Cobb*, 4 Mass. 511, per *Parsons C. J.*; *Eastman v. Wright*, 6 Pick. 316, 322; *Forrest v. Warrington*, 2 Desaus. 254; *Black v. Everett*, 5 Stew. & Port. 60; *Garland v. Richeson*, 4 Rand. 266; *Lyon v. Summers*, 7 Conn. 399. *Blackstone* seems to have entertained the opinion that the term *chose*, or thing in action, only included debts due or damages recoverable for the breach of a contract, express or implied. 2 Bl. Com. 388, 396, 4 Denio, 82. But Mr. Chancellor Kent 397; *Bronson C. J.* in *Gillet v. Fairchild*, gives to the term a far more extended signification. He says: "*Choses in action* are personal rights not reduced to possession, but recoverable by action at law. Money due on bond, note, or other contract, damages due for breach of covenant for the detention of chattels, or for torts, are included under this general head of title to things in action." 2 Kent, 351. In *Gillet v. Fairchild*, 4 Denio, 80, 82, *Bronson C. J.* adopts the above description. In *People v. Tioga C. P.* 19 Wend. 75, Mr. Justice Cowen said: "*Chose in action*, taken in its broadest latitude, comprehends not only a demand arising on

contract, but also a wrong or injury done to property or person. But for the purposes of any sort of assignment, legal or equitable, I can nowhere find that the term has ever been carried beyond a claim due either on contract, or such whereby some special damage has arisen to the estate of the assignor." And he concludes that demands arising from injuries strictly personal, whether arising from tort or contract, are not assignable, but all others are. *Gardiner C. J.* in *McKee v. Judd*, 2 Kernan (N. Y.), 625, 626.

(f¹) *Clark v. Swift*, 3 Met. 394, 395; *Putnam J.* in *Gardner v. Hoeg*, 18 Pick. 170; *Sater v. Henderson*, 1 Morris, 118; *Shaw C. J.* in *Palmer v. Merrill*, 6 Cush. 266. Thus, if a bond is assigned, the assignee cannot maintain an action on it in his own name, but he may sue and recover the money in the name of the obligee. *Legh v. Legh*, 1 Bos. & Pul. 447; *Heath v. Hall*, 4 Taunt. 328; *Phillips v. Claggett*, 11 M. & W. 84. "The assignor, by the assignment, gives authority to the assignee to use his name in any legal proceedings which may become necessary to give full effect to the assignment. The assignor becomes the trustee of the assignee." *Morton J.* in *Eastman v. Wright*, 6 Pick. 316, 322. It is, however, only when the assignee has acquired a title through the promisee that he can insist upon the right to maintain an action in the name of the promisee. *Ballard v. Greenbush*, 24 Maine, 336. In practice, a debt is frequently recovered in the name of the assignor for the benefit of the assignee, when, from the peculiar facts of the case, no action could have been maintained by the last named party against the debtor. Thus, A., B., and C. are shareholders and partners in a mercantile concern, which stops payment, being at the time of stoppage indebted to

[The action at law must always be brought in the name of the assignor of a *chose in action*, unless the debtor has promised to pay the assignee; the assignment authorizing the assignee to use the assignor's name in all necessary legal proceedings. (g) Upon the decease of the assignor, the assignee may sue in the name of the executor or administrator. (h)

Action at law to be in name of assignor.

If the debtor has assented to the assignment and expressly promised to pay the assignee, the action may be brought in the name of the assignee. (i) The obligor in a bond may be sued in assumpsit upon a promise to perform

Unless debtor has promised to pay.

D. and other creditors. A., being largely interested in the concern, and anxious to effect a speedy adjustment of its affairs, gives security to a certain bank for advances to be made by them for the purpose of liquidating the various claims upon the company in which he is interested. Out of these advances D. is paid, who thereupon assigns the debt due to him from the firm to a trustee on behalf of A. An action may now be maintained against B. and C., who are shareholders in the insolvent concern, in the name of D., and the amount of said debt may thus be recovered for the benefit of A., who could not sue his copartners at law. Nor can payment be pleaded by B. and C. in defence to such an action; for the transaction amounts in law to a purchase of the debt due to D., and not to payment. See *M'Intyre v. Miller*, 13 M. & W. 725.

(g) *Amherst Academy v. Cowles*, 6 Pick. 427; *Mosher v. Allen*, 16 Mass. 452; *Winchester v. Hackley*, 2 Cranch, 342; *Mulford v. French*, 2 Penn. 463; *Jarman v. Howard*, 3 Marsh. 384; *Eastman v. Wright*, 6 Pick. 322; *Norris v. Douglass*, 2 South. 817; *Parker C. J. in Usher v. D'Wolfe*, 13 Mass. 290, 292; *Coolidge v. Ruggles*, 15 Mass. 388; *Jessel v. Williamsburg Ins. Co.* 3 Hill, 88; *Skinner v. Somes*, 14 Mass. 107; *M'Kinney v. Alvis*, 14 Ill. 33; *Pitts v. Holmes*, 10 Cush. 92, 97; *Powles v. Innes*, 11 M. & W. 10. By the statutes or the local usages of several of the states of the Union, assignees are authorized to sue in their own names on assigned bonds and other contracts. *Smith*

v. Schibel, 19 Missou. 140; *Worthington v. Curd*, 15 Ark. 491; *Long v. Constant*, 19 Missou. 320; *Cox v. Sprigg*, 6 Md. 274; *Dickinson v. Burr*, 15 Ark. 372; *Priolean v. Southwestern R. R. Bank*, 16 Geo. 582.

(h) *Grover v. Grover*, 24 Pick. 261; *Dawes v. Boylston*, 9 Mass. 337; *Cutts v. Perkins*, 12 Mass. 206.

(i) *Lang v. Fiske*, 2 Fairf. 385; *Smith v. Berry*, 18 Maine, 122; *Barger v. Collins*, 7 Harr. & J. 213; *Crocker v. Whitney*, 10 Mass. 316, 319; *Richardson C. J. in Wiggin v. Damrell*, 4 N. H. 69; *Currier v. Hodgdon*, 3 N. H. 32; *Warren v. Wheeler*, 21 Maine, 484; *Mowry v. Todd*, 12 Mass. 281; *Morton J. in Parkhurst v. Dickerson*, 21 Pick. 307, 309, 310; *Bucklin v. Ward*, 7 Vt. 195; *Moar v. Wright*, 1 Vt. 57; *Stiles v. Farrar*, 18 Vt. 444; *Thompson v. Emery*, 27 N. H. 269; *Clark v. Thompson*, 2 R. I. 146; *Hodges v. Eastman*, 12 Vt. 358; *Shaw C. J. in Derby v. Sandford*, 9 Cush. 264; *Bourne v. Cabot*, 3 Met. 305; *Weed v. Jewett*, 2 Met. 608; *Tibbetts v. Gerrish*, 25 N. H. 41, 48; *Edson v. Fuller*, 22 N. H. 191. It makes no difference whether the *chose in action* assigned was a written or parol contract, or consisted of an express or implied promise. *Clark v. Thompson*, 2 R. I. 146, 149; *Currier v. Hodgson*, 3 N. H. 82. The promise of the debtor to pay the assignee in such cases may be inferred from the acts of the parties; *Barger v. Collins*, 7 Harr. & J. 213; *Crocker v. Whitney*, 10 Mass. 281; *Doty v. Wilson*, 14 John. 378; *Hawes v. Saunders*, Cowper, 290; *Fenner*

[made by him to an assignee thereof; and the assignee may bring the action in his own name. (*j*)

But where the contract, or other matter assigned, comes properly within the jurisdiction of a court of equity, the assignee may sue upon it in that court, in his own name, irrespective of any promise by the debtor to pay him. (*k*) So, where special circumstances render it necessary for the assignee to seek the jurisdiction of a court of equity for relief, to prevent a failure of justice, the assignee may sustain his suit there upon a mere legal demand, as, if the assignor interferes to prevent the assignee from trying the matter in his name at law, especially if this interference be in collusion with the debtor. (*l*) But, as a general rule, a court of equity will not entertain a suit brought by the assignee of a debt or contract, which is a mere legal demand, but will leave him to his suit at law in the name of the assignor. (*m*)

A court of equity will decree specific performance of a contract in favor of the assignee of the benefit of it. Thus, the assignee of a contract for the purchase of land may obtain specific performance against the vendor. (*n*) So, the assignee of an agreement for a lease may enforce

Specific performance of contract in favor of assignee.
v. Meares, 2 Wm. Bl. 1269; and the equitable interest obtained by the assignment is said to be sufficient consideration to sustain the express promise. See *Thompson v. Emery*, 27 N. H. 273; *Currier v. Hodgdon*, 3 N. H. 273; *Edson v. Fuller*, 23 N. H. 191; *Crocker v. Whitney*, 10 Mass. 316, 319; *Doty v. Wilson*, 14 John. 378; *Wiggin v. Damrell*, 4 N. H. 75. But see, upon this last point, 10 Mass. 322, *Rand's* note; 1 Wms. Saund. 210, note (1); *Tibbets v. George*, 5 Ad. & El. 115; 21 Amer. Jur. 284, and *post*, "Novation."

(*j*) *Warren v. Wheeler*, 21 Maine, 484.

(*k*) *Master v. Miller*, 4 T. R. 340, per Buller J.; *Row v. Dawson*, 1 Ves. sen. 331; *Smith v. Everett*, 4 Bro. C. C. (Perkins's ed.) 48, 50; *Lett v. Morris*, 4 Sim. 607; *Morton v. Naylor*, 1 Hill, 583; 2 Story Eq. Jur. §§ 1044, 1057; *Tiernan v. Jackson*, 5 Peters (U. S.), 498; *Ex parte South*, 3 Swanst. 393; *Ensign v. Kellogg*, 4 Pick. 1; *Nelthorpe v. Holgate*, 1 Coll. C. C. 203, 217.

(*l*) *Hammond v. Messenger*, 9 Sim. 327; *Ontario Bank v. Mumford*, 2 Barb. Ch. 597; *Riddle v. Mandeville*, 5 Cranch, 322; *Keys v. Williams*, 3 Y. & C. Ex. 462, 466; *Rose v. Clarke*, 1 Y. & C. 534. A court of equity will not assist an assignee of a *chose in action* unless the assignment was made upon a valid consideration. *Edwards v. Jones*, 1 My. & Cr. 226; *M'Fadden v. Jenkyns*, 1 Hare, 458, 461.

(*m*) *Hammond v. Messenger*, 9 Sim. 327; 1 Dan. Ch. Pr. (Perkins's ed.) 248, in note; *Ontario Bank v. Mumford*, 2 Barb. Ch. R. 597; *Carter v. United Ins. Co.* 1 John. Ch. 463; *Adair v. Winchester*, 7 Gill & J. 114; *Moseley v. Boush*, 4 Rand. 391; *Smiley v. Bell*, Martin & Yerger, 378; *Dhegetoft v. London Ins. Co.* Moseley R. 83; *Gover v. Christie*, 2 Harr. & J. 67; *Townsend v. Carpenter*, 10 Ohio, 21, is contrary.

(*n*) *Nelthorpe v. Holgate*, 1 Coll. C. C. 203.

[the granting of the lease; but the lessor is entitled to have the covenants executed by the person with whom the original agreement was made. (*m*¹)

As a general rule, where there is no statute provision or rule of public policy to prevent, all *choses in action*, in the sense of claims for debts due, and damages recoverable for the breach of contracts, express or implied, may pass by assignment. (*n*) A debt for goods sold, of which the evidence rests on an account book, is assignable; (*o*) so the unliquidated balance due on mutual accounts; (*p*) so a judgment and execution. (*q*) A bond may be assigned, and the assignee may maintain a suit upon it either, in a proper case, in equity in his own name, (*r*) or at law in the name of the assignor. (*s*) The assignee of a bond cannot sue at law upon it in his own name, although it is made payable to "assigns," (*t*) unless an express promise is made to pay him. (*u*)

The protection thus afforded to an assignee of *choses in action* is not limited to such as are actually existing at the time of the assignment. A valid assignment may be made of the expected, though contingent avails of future transactions under an existing contract; as, of compensation not yet earned, but to be earned under an existing contract, although subject to a contingency, whether it ever will be earned. (*v*) So a contingent debt may be

(*m*¹) *Crosbie v. Tooke*, 1 Myl. & K. 431; *Morgan v. Rhodes*, 1 Myl. & K. 435; *Dowell v. Dew*, 1 Y. & G. C. C. 345.

(*n*) See per Parsons C. J. in *Dix v. Cobb*, 4 Mass. 511; *Comegys v. Vasse*, 1 Peters (U. S.), 193; *Crocker v. Whitney*, 10 Mass. 316; *Lawrence v. Bayard*, 7 Paige, 70; *Gillet v. Fairchild*, 4 Denio, 80, 82. It seems, that a cause of action, which would survive to personal representatives, can be transferred to and enforced by an assignee. *Zabriskie v. Smith*, 3 Kernan (N. Y.), 322.

(*o*) *Dix v. Cobb*, 4 Mass. 511; *Norris v. Dotglass*, 2 South. 817; *Woodbridge v. Perkins*, 3 Day, 364; *Spafford v. Page*, 15 Vt. 490; *Cummings v. Fullam*, 13 Vt. 434.

(*p*) *Bartlett v. Pearson*, 29 Maine, 9; *Crocker v. Whitney*, 10 Mass. 316; *Mulhall v. Quinn*, 1 Gray, 105, 107.

(*q*) *Dunn v. Snell*, 15 Mass. 481; *Allen v. Holden*, 9 Mass. 133; *Brown v. Maine*

Bank, 11 Mass. 153; *Jones v. Burton*, 5 Blackf. 372; *Gayle v. Benson*, 3 Ala. 234; *Haden v. Walker*, 5 Ala. 86; *Harrison v. Marshall*, 6 Porter, 65; *State v. Herod*, 6 Blackf. 444.

(*r*) *Ensign v. Kellogg*, 4 Pick. 1.

(*s*) *Skinner v. Somes*, 14 Mass. 107; *Legh v. Legh*, 1 Bos. & Pul. 447; *Phillips v. Cloggett*, 11 M. & W. 84; *Lacey v. Lacey*, 7 Barr, 251.

(*t*) *Skinner v. Somes*, 14 Mass. 107; *Smock v. Taylor, Coxe*, 177; *Sheppard v. Stiles*, 2 Halst. 24.

(*u*) *Warren v. Wheeler*, 21 Maine, 484.

(*v*) If a party is under an engagement for a term of time, to which a salary is affixed, payable quarterly, especially if he has entered upon the duties of his office, although at any time liable to be removed, he has an interest which may be assigned. *Brackett v. Blake*, 7 Met. 335. So wages to be earned under a subsisting engagement may be assigned, although the work-

Contingent [assigned, and when the debt becomes due on the hap-
debts. pening of the contingency, the assignee may sue for it
in his own name, if the debtor has promised to pay him. (*w*)

But to render a debt or claim a proper subject of an assignment
at law, it must have an actual or potential existence. It
What may not be as- must be a claim to something due or to become due.
signed. The mere possibility of being employed by a person, and
of earning wages under that employment at a future time, is not
the subject of an assignment. (*x*)

man works by the piece, and his wages per month vary. *Hartley v. Tapley*, 2 Gray, 565. In this case the court said: "The rule is, that wages to be earned under an engagement existing at the time of giving the order, are assignable; but not money to be earned hereafter under a new engagement." *Taylor v. Lynch*, 5 Gray, 49. Where a workman in the employment of a manufacturing company made an assignment of the wages then due, and which should thereafter become due to him to a certain date, in consideration of being indebted to the assignee, and an undertaking on the part of the latter to supply the former with groceries, from time to time, as his family might need them, it was held, that the assignment, in the absence of fraud, was valid, and transferred to the assignee all the assignor's interest in his wages for the time specified. *Emery v. Lawrence*, 8 Cush. 151. In *Weed v. Jewett*, 2 Met. 605, an assignment of future earnings was held good, where the assignor was in the actual employment of a third party, though it did not appear whether for a certain time or indefinitely. In *Gardner v. Hoeg*, 18 Pick. 168, an assignment by a seaman, before the commencement of a whaling voyage for which he had shipped, of his lay or share in the profits of the voyage, was sustained. A seaman on board a whale-ship, upon a certain lay, gave an order in writing without date upon the owners to certain persons — to whom he was indebted in a small sum, and who afterwards advanced more for the seaman's benefit, — authorizing them to receive the whole amount of

his lay or voyage. Notice of this order was given to the owners of the ship. *Shaw C. J.* said: "The plaintiff contends that this order upon the owners; given by the seaman to the trustees [the payees], authorizing them to receive the whole of his voyage or lay, in part to secure them for advances, was an assignment, and vested an interest in them. We think that is the true view of the transaction; it was an authority coupled with an interest, in its nature not revocable by the party who gave it; and this is the true description of an assignment. But it was an equitable assignment, the assignment of a *chose in action*. It gave them an equitable or beneficial interest, to the extent of their advances." *Osborne v. Jordan*, 3 Gray, 277.

(*w*) *Crocker v. Whitney*, 10 Mass. 316. There must be an existing contract, on which the debt may arise. This is the foundation on which such an assignment of a future contingent interest must rest; for without any existing contract to uphold it, there could be no existing interest to assign. *Cutts v. Perkins*, 12 Mass. 206; *Farnsworth v. Jackson*, 32 Maine, 422, 423. It is not necessary that money, payable on a contingency, should be payable by virtue of a written contract to make it assignable. *Shepley J.* in *Farnsworth v. Jackson*, 32 Maine, 423.

(*x*) *Mulhall v. Quinn*, 1 Gray, 105; *Farnsworth v. Jackson*, 32 Maine, 419. To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assign-

[A power of attorney, although irrevocable in terms, does not amount to an assignment, when no assignable interest exists at the time. (y) A mere license cannot be assigned; as, to cut timber, or erect a dam on the lands of the grantor. (z) A contract of apprenticeship is one of personal trust, and is not assignable. (a)]

A mere
license.
Appren-
ticeship
contract.

So contracts in which the personal acts and qualities of one of the contracting parties form a material ingredient are, in general, not assignable; thus, a contract by a publisher with an author to publish a work, was held not assignable by the publisher to another, without the consent of the author, in consequence of the personal trust placed in the publisher by the author. (a¹) A mere offer of a contract made to a person, before acceptance, is not assignable even in equity. (a²)

Certain *choses in action* have been held not to be assignable, either at law or in equity, for reasons of public policy. Thus, the accruing half pay of officers in the army and navy has been held, in England, not to be assignable. (b)

Half pay
and commis-
sions.

ment; a mere possibility is not assignable. Story J. in *Mitchell v. Winslow*, 2 Story, 630, 638; *Wood & Foster's case*, 1 Leon. 42; *Grantham v. Hawley*, Hobart, 132; *Robinson v. Macdonnell*, 5 M. & S. 228. See *Stewart v. Kirkland*, 19 Ala. 162. But in equity assignments are supported of contingent interests and expectations, and also of things which have no present, actual, or potential existence, but rest in mere possibility only. Story J. in *Mitchell v. Winslow*, 2 Story, 630, 639; *Field v. Mayor &c. of New York*, 2 Selden (N. Y.) 179; *Commercial Bank v. Colt*, 15 Barb. 506. See per *Putnam J.* in *Gardner v. Hoeg*, 18 Pick. 168.

(y) *Hall v. Jackson*, 20 Pick. 194. See *Carrique v. Sidebottom*, 3 Met. 297; *Weed v. Jewett*, 2 Met. 608. A letter of attorney, irrevocable, to receive a sum of money to the attorney's own use, is *prima facie* an assignment; but as it is not a direct, and is only a constructive assignment, it is capable of being explained by extrinsic evidence. *Gerrish v. Sweetser*, 4 Pick. 374.

(z) *Emerson v. Fisk*, 6 Greenl. 200; *Mellen C. J.* in *Pease v. Gibson*, 6 Greenl. 83; *Carleton v. Redington*, 21 N. H.

291; *Cowles v. Kidder*, 24 N. H. 379, 380; *Howes v. Ball*, 7 B. & C. 481. A grocery license is not assignable. *Lewis v. United States*, 1 Morris, 199; *Munsell v. Temple*, 3 Gilm. 93. A license to keep a ferry, was held in Illinois, not to be transferable. *Lombard v. Cheever*, 3 Gilm. 469.

(a) *Tucker v. Magee*, 13 Ala. 99; *Davis v. Coburn*, 8 Mass. 199; *Hall v. Gardner*, 1 Mass. 172; *Clement v. Clement*, 8 N. H. 471.

(a¹) *Stevens v. Benning*, 1 K. & J. 168. See per Lord Abinger C. B. in *Gibson v. Carruthers*, 8 M. & W. 321, 343.

(a²) *Meynell v. Surtees*, 3 Sm. & Giff. 101, 117.

(b) "Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it." "Besides, an officer has no certain interest in his half pay, for the king may at any time strike him off the list. Indeed, assignments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the judges, which are granted to sup-

[The same has been held in respect to their commissions. (c) Shares of seamen in prizes, captured by private armed vessels, are not assignable, so as to authorize a suit against the agent in the name of the assignee. (d) So the assignment of a bare right to file a bill in equity for a fraud committed upon the assignor, has been considered void, as contrary to public policy. (e) Mere right of action for tort. So a mere right of action for a tort has, for the like reason, been held not to be assignable. (f) A distinction has, however, been taken between different classes of torts: those, which cause injuries strictly personal, being regarded as furnishing no assignable claim for damages; (g) while the contrary is held as to those, from which some special loss has arisen to the estate of the assignor. (h) Thus, it has been decided in New York, that a claim to damage arising from the wrongful conversion of personal property is a *chose in action*, that is assignable. (i) No assignment will, however, be upheld, which involves

port the dignity of the state and the administration of justice, may be assigned." Lord Kenyon C. J. in *Flarty v. Odum*, 3 T. R. 681, 682, 683; *Lidderdale v. Montrose*, 4 T. R. 248; *Gardner v. Hoeg*, 18 Pick. 171; *Wells v. Foster*, 8 M. & W. 149; *Stone v. Lidderdale*, 2 Anst. 553; *McCarthy v. Goold*, 1 Ball & Beat. 387; *Tunstall v. Boothby*, 10 Sim. 542, 549; *Price v. Lovett*, 4 Eng. Law & Eq. 110.

(c) 2 Story Eq. Jur. § 1040 d; *Collyer v. Falcon*, 2 Turn. & R. 459. But an officer in the army may assign for the benefit of his creditors the difference received by him upon going on half pay. *Price v. Lovett*, 4 Eng. Law & Eq. 110.

(d) *Usher v. D'Wolfe*, 13 Mass. 290.

(e) *Prosser v. Edmonds*, 1 Y. & Coll. 481; 2 Story Eq. Jur. § 1040 g; *Morrison v. Deadrick*, 10 Humph. 342.

(f) *Gardner v. Adams*, 12 Wend. 297; 2 Story Eq. Jur. § 1040 g; *Comegys v. Vasse*, 1 Peters (U. S.), 193. In *McKee v. Judd*, 2 Kernan, 625, Hand J. dissenting, said: "Where the assignment is made on the mere motion of the parties, of the mere right to bring an action for a mere tort, it has been considered void on the ground of public policy."

(g) *Comegys v. Vasse*, 1 Peters (U. S.), 193, 213, per Story J.; *Cowen J.* in *People v. Tioga C. P.* 19 Wend. 75; *Gardiner C. J.* in *McKee v. Judd*, 2 Kernan, 625, 626.

(h) *Cowen J.* in *People v. Tioga C. P.* 19 Wend. 75; *Gardner C. J.* in *McKee v. Judd*, 2 Kernan, 625, 626.

(i) *McKee v. Judd*, 2 Kernan, 625, 626; two judges dissented. But in the subsequent case of *Zabriskie v. Smith*, 3 Kernan, 332, 333, Denio J. said: "We decided at the last term in the case of *McKee v. Judd*, that a right of action for the conversion of personal chattels might be assigned, so as to vest a property in the assignee." "This was in accordance with *Gillett v. Fairchild*, 4 Denio, 80, and *Hudson v. Plets*, 11 Paige, 180, and I have no doubt of its correctness." It had been previously decided that the owner of a chattel wrongfully withheld by another might sell it so as to give the purchaser a right to demand it, and upon refusal to deliver it, to bring an action for the conversion done to himself by such refusal. *Hall v. Robinson*, 2 Comst. 293. See *Happiss v. Eskridge*, 2 Ired. Ch. 54; *Day v. Whitney*, 1 Pick. 503. But see *Stog-*

[a violation of the principles of law respecting champerty and maintenance. (*j*) But a man may, consistently with these principles, purchase by assignment the whole interest of another in a contract, or security, or other property, which is in litigation, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest, which he has so acquired. (*k*)

Property
in litigation
may be as-
signed.

It was formerly held, that an assignment of a contract must be made by an instrument of as high a nature as that evidencing the contract. (*l*) But it is now established that no particular form is necessary, in equity, to constitute an assignment of a debt or *chose in action*. (*m*) Any order, (*n*) writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund. (*o*) An assignment of a debt may be by parol as well as by deed. (*p*) And where the assignment has been executed by a delivery of the evidence of the contract,

Of the mode
of making
assignments.

dell v. Fugate, 2 Marsh. (Ky.) 136; *Dunklin v. Wilkins*, 5 Ala. 199.

(*j*) *Wood v. Downes*, 18 Ves. jr. 125, 126; *Arden v. Patterson*, 5 John. Ch. 44, 48, 51; 2 Story Eq. Jur. § 1049.

(*k*) 2 Story Eq. Jur. § 1050.

(*l*) *Wood v. Partridge*, 11 Mass. 488, 491; *Perkins v. Parker*, 1 Mass. 117; *Dennis v. Twitchell*, 11 Met. 183; *Brewer v. Dyer*, 7 Cush. 337; *Vose v. Handy*, 2 Greenl. 334; *Dunn v. Snell*, 15 Mass. 484.

(*m*) 2 Story Eq. Jur. § 1047; *Putnam J. in Weed v. Jewett*, 2 Met. 609; *Conway v. Cutting*, 51 N. H. 407.

(*n*) *Bourne v. Cabot*, 3 Met. 305. An order, draft, or bill, drawn for the whole of a particular fund is an equitable assignment of such fund to the payee, and binds it after notice to the drawee. *Mandeville v. Welch*, 5 Wheat. 285; *Robbins v. Bacon*, 3 Greenl. 346; *Corser v. Craig*, 1 Wash. C. C. 424; *Adams v. Robinson*, 1 Pick. 461; *Legro v. Staples*, 16 Maine, 252; *Johnson v. Thayer*, 17 Maine, 401; *Gibson v. Finley*, 4 Md. Ch. 75; *Rodick v. Gandell*, 1 De G., M. & G. 763; *Parkhurst v. Dickerson*, 21 Pick. 307; *Blin v. Pierce*, 20 Vt. 25; *Shaw C. J. in Palmer v. Merrill*, 6 Cush. 287; *Conway v. Cutting*, 51 N. H. 407. But an order, or draft, for a part only of a debt does not,

against the consent of the drawee, amount to an assignment; for the debtor is not to be subjected to distinct demands on the part of several persons, when his contract was one and entire. *Gibson v. Cooke*, 20 Pick. 15; *Mandeville v. Welch*, 5 Wheat. 287; *Shaw C. J. in Palmer v. Merrill*, 6 Cush. 287; *Bullard v. Randall*, 1 Gray, 605. See *Robbins v. Bacon*, 3 Greenl. 346, 350; *Gibson v. Finley*, 4 Md. Ch. 75; *The Hull of a New Ship*, *Davies*, 199. The order should be direct on the debtor, or person holding the funds of the drawer. *Rodick v. Gandell*, 1 De G., M. & G. 763. See *Williams v. Everett*, 14 East, 582; *Wharton v. Walker*, 4 B. & C. 163; *Malcolm v. Scott*, 5 Exch. 601; *S. S. 3 Mac. & G. 20*; *Moore v. Bushell*, 27 L. J. Exch. 3; *Liversidge v. Broadbent*, 4 H. & N. 603.

(*o*) *Morton v. Naylor*, 1 Hill (N. Y.), 583; *Gerrish v. Sweetser*, 4 Pick. 374; *Hoyt v. Story*, 3 Barb. 262; *Alexander v. Adams*, 1 Strobb. 47. There must be an absolute transfer of the control of the fund to the assignee; *Dickenson v. Phillips*, 1 Barb. 454; so as to authorize the holder of the fund to pay it to the assignee, without the further interference of the debtor. *Hoyt v. Story*, 3 Barb. 262.

(*p*) *Crane v. Gough*, 4 Md. 316.

[no writing is necessary to its validity. (*q*) If the case is such that an actual delivery cannot be made, a symbolical delivery seems to be sufficient. (*r*) An equitable assignment of a judgment may be made by parol; and a delivery of the execution is a sufficient symbolical delivery of the judgment on which it issued. (*s*) A written contract for the sale of real estate may be assigned by an oral agreement. (*s*¹)

The assignee of a *chose in action* takes it subject to all the equities existing between the assignor and the debtor, at the time the latter has notice of the assignment, (*s*²) and, in an action upon it in the name of the assignor the debtor may avail himself of all matters in defence and set-off, which he could have urged against the assignor, if the

To what matters of defence assignee of *chose in action* is liable.

(*q*) Jones *v.* Witter, 13 Mass. 304; Dunn *v.* Snell, 15 Mass. 481; Crain *v.* Paine, 4 Cush. 485; Curtis *v.* Norris, 8 Pick. 280, 282; Mowry *v.* Todd, 12 Mass. 281; Heath *v.* Hall, 4 Taunt. 326-328; Tibbits *v.* George, 5 Ad. & El. 107, 115, 116; Wiley *v.* Collins, 2 Fairf. 193; Vose *v.* Handy, 2 Greenl. 322; Prescott *v.* Hull, 17 John. 284; Porter *v.* Ballard, 26 Maine, 448; Lacey *v.* Lacey, 7 Barr. 251; Dennis *v.* Twitchell, 10 Met. 180, 184; Canfield *v.* Monger, 12 John. 346; Briggs *v.* Dorr, 19 John. 95; Ford *v.* Stuart, 19 John. 342; Colburn *v.* Rossiter, 2 Conn. 503; Titcomb *v.* Thomas, 5 Greenl. 282; Clark *v.* Rogers, 2 Greenl. 147.

(*r*) Porter *v.* Ballard, 26 Maine, 448, 452; Robbins *v.* Bacon, 3 Greenl. 349.

(*s*) Dunn *v.* Snell, 15 Mass. 481; Porter *v.* Ballard, 26 Maine, 448, 452; Ford *v.* Stuart, 19 John. 342; Crain *v.* Paine, 4 Cush. 483, 485. In order to render an assignment available to the assignee, Shaw C. J. in Palmer *v.* Merrill, 6 Cush. 286, 287, said: "The party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt or right in question, and according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or *chose in action* arises." "The transfer of

a *chose in action* bears an analogy in some respect, to the transfer of personal property; there can be no actual manual tradition of a *chose in action*, as there must be of personal property to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it, on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in the place of the assignor as owner." See Whittle *v.* Skinner, 23 Vt. 531; Spring *v.* So. Car. Ins. Co. 8 Wheat. 268, 287.

(*s*¹) 1 Sugden V. & P. (8th Am. ed.) 125, note (*d*); Currier *v.* Howard, 14 Gray, 511; Brown *v.* Jones, 46 Barb. 400; Bullion *v.* Campbell, 27 Texas, 653.

(*s*²) The assignment is complete, as between the assignee and assignor, without notice to the debtor; but the assignment is not complete as against the debtor until notice. 2 Story Eq. Jur. § 1057. This notice need not be given in any formal manner, or with the express purpose of completing the assignment; notice of the assignment, however acquired, being sufficient to affect the debtor with the trust, and the manner or purpose of giving or obtaining the notice being immaterial.

[claim had not been assigned. (t) But the debtor can impose no

Smith v. Smith, 2 C. & M. 231; Meux v. Bell, 1 Hare, 73; Edwards v. Scott, 1 M. & G. 962; Tibbits v. George, 5 Ad. & El. 107. Notice to one of several joint debtors or co-trustees is, in general, sufficient, so long as he continues a joint debtor or trustee; Smith v. Smith, 2 Cr. & M. 231; Meux v. Bell, 1 Hare, 73; Timson v. Ramsbottom, 2 Keen, 35; unless the one having notice is himself the assignor. Browne v. Savage, 4 Drew. 635; Willes v. Greenhill, 29 Beav. 376. Until the title of the assignee is perfected by notice to the debtor of the assignment, a subsequent assignee may acquire a priority of right by giving prior notice of his assignment, or the debt may be discharged by a *bonâ fide* payment to the original creditor. 2 Story Eq. Jur. § 1057; Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, 3 Russ. 30.]

(t) Shepley J. in Bartlett v. Pearson, 29 Maine, 9, 15; Sanborn v. Little, 3 N. H. 539; Green v. Hatch, 12 Mass. 195; Sargent v. Southgate, 5 Pick. 312; Weeks v. Hunt, 6 Vt. 15; Murray v. Lyburn, 2 John. Ch. 441, 443; Norton v. Rose, 2 Wash. 233, 254; Hooper v. Brandage, 22 Maine, 460; Guerry v. Perryman, 6 Geo. 119; Comstock v. Farnum, 2 Mass. 96; Willis v. Twombly, 13 Mass. 206; Mostellen v. Bost, 7 Ired. Eq. 39; Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25; Blin v. Pierce, 20 Vt. 25; Dyer v. Homer, 22 Pick. 253, 256; Walker v. Sargent, 14 Vt. 247; Ainslie v. Boynton, 2 Barb. 258; Gay v. Gay, 10 Paige, 369. The assignee of a *chose in action*, has power to reassign it. Dawes v. Boylston, 9 Mass. 337. But the second assignee also takes it subject to the equities between the original parties. Murray v. Gouverneur, 2 John. Cas. 438; Clute v. Robison, 2 John. 595; Metzgar v. Metzgar, 1 Rawle, 227. If the same demand has been twice assigned by the same assignor, the second assignee takes subject to the first assignment, although no notice has been given of it before the second assignment. *Qui prior est tempore, potior est jure*. Nuer v. Schenck, 3 Hill, 228. Until notice of the assignment, the

rights and interests of the debtor are in no way affected by it. Loomis v. Loomis, 26 Vt. 198; Parsons C. J. in Comstock v. Farnum, 2 Mass. 95. If, in the mean time, and before such notice, the debtor pays the debt to the assignor, or his subsequent assignee, he will be discharged. Jones v. Witter, 13 Mass. 304; Stocks v. Dobson, 19 Eng. Law & Eq. 96; Ward v. Morrison, 25 Vt. 593. It is the notice of the assignment that binds the debtor, and devolves on him an equitable obligation in favor of the assignee. The assignment operates between the assignor and assignee only, until the act of notice takes place, which brings the debtor into the arrangement. Parker C. J. in Jones v. Witter, 13 Mass. 304, 307; Crocker v. Whitney, 10 Mass. 316, 319; Mowry v. Todd, 12 Mass. 281; Morton J. in Parkhurst v. Dickerson, 21 Pick. 310. Special notice, however, is not necessary; it is enough, if the party to be affected has such knowledge of facts and circumstances as ought to induce a reasonable belief of the fact. Anderson v. Van Alen, 12 John. 343; Parvris J. in Hackett v. Martin, 8 Greenl. 77, 79; United States v. Sturges, 1 Paine, 525; Kellogg v. Krauser, 14 Serg. & R. 137. It is sufficient, if the debtor is fully informed of the existence of the assignment, though the assignee does not exhibit the security, or offer other evidence of the assignment, when it is not demanded of him for the proper satisfaction of the debtor. Bean v. Simpson, 16 Maine, 49; Davenport v. Woodbridge, 8 Greenl. 17; Johnson v. Bloodgood, 1 John. Ch. 51. Though it is necessary that the debtor should have notice, yet there is no necessity that he should concur in the arrangement. Bell v. London & North Western Railway Co. 15 Beav. 548; Spring v. So. Car. Ins. Co. 8 Wheat. 268; Tibbits v. George, 5 Ad. & El. 107; McGowan v. Smith, 26 L. J. Ch. 8; Belcher v. Campbell, 8 Q. B. 1, 11. After notice to the debtor, the debt is no longer in the order and disposition of the assignor, and his assignees in bankruptcy acquire no claim. Crowfoot v. Gurney, 9

[other burdens, nor claim any other deductions; (*u*) he cannot diminish the amount equitably and justly due at the time of such notice by any matter of claim subsequently accruing, or by any subsequent payment to the assignor, (*v*) nor can he avail himself, for that purpose, of any subsequent acts or admissions of the assignor; (*w*) nor of any release or discharge by him, given after such notice to the debtor. (*x*) And if the assignment is made on good consideration and *bonâ fide*, (*y*) the creditors of the assignor cannot avoid or defeat it, by an attachment under the trustee or other similar process, although the debtor had no previous notice of the assignment. (*z*)

Bing. 372; Hutchinson v. Heyworth, 9 Ad. & El. 375; Lees v. Whiteley, L. R. 2 Eq. 143. Notice of the assignment of a debt or fund given to the debtor or trustee, before the money is actually due, or the relation of trustee is created, is ineffectual to give priority over a previous assignment. Buller v. Plunkett, 1 Johns. & H. 441; Webster v. Webster, 31 Beav. 393; Somerset v. Cox, 33 Beav. 634. If a person takes a negotiable instrument which is transferable by indorsement only, without that formality, he is in the position merely of an equitable assignee, and is affected with all the equities which attached to the instrument in the hands of the assignor. Whistler v. Forster, 14 C. B. N. S. 248. Where the assignee of a debt gave notice of his claim to the debtor and demanded payment, but the assignor disputed the alleged assignment, it was held that the debtor was justified in paying his original creditor, until the assignee obtained an injunction. Aplin v. Cates, 30 L. J. C. 6.

(*u*) Shepley J. in Bartlett v. Pearson, 29 Maine, 9, 15; Jenkins v. Brewster, 14 Mass. 294; Greene v. Darling, 5 Mason, 201, 214; Duncklee v. Greenfield Steam Mill Co. 23 N. H. 245, 250; Bishop v. Holcomb, 10 Conn. 444.

(*v*) Shepley J. in Bartlett v. Pearson, 29 Maine, 9, 15; Jefferson County Bank v. Chapman, 19 John. 322; Ritchie v. Moore, 5 Munf. 388; Newman v. Crocker, 1 Bay, 246; Cummings v. Fullam, 13 Vt. 434; Laughlin v. Fairbanks, 8 Missou.

367; Goodwin v. Cunningham, 12 Mass. 193; Littlefield v. Storey, 3 John. 425; Jenkins v. Brewster, 14 Mass. 294; Greene v. Hatch, 12 Mass. 195; State v. Jennings, 5 Eng. 428; Ridgway v. Collins, 3 A. K. Marsh. 410; Daviess v. Newton, 5 J. J. Marsh. 89.

(*w*) Hackett v. Martin, 8 Greenl. 77; Webb v. Steele, 13 N. H. 230; Kimball v. Huntington, 10 Wend. 675; Frear v. Evertson, 20 John. 142; Matthews v. Houghton, 1 Fairf. 420; Reed v. Nevins, 38 Maine, 193; Fitzpatrick v. Beatty, 1 Gilman, 454.

(*x*) Andrews v. Beecker, 1 John. Cas. 411; Raymond v. Squire, 11 John. 47; Dix v. Cobb, 4 Mass. 508, 511; Brown v. Maine Bank, 11 Mass. 157, 158; Anderson v. Miller, 7 Sm. & M. 586; Alner v. George, 1 Camp. 392; Legh v. Legh, 1 B. & P. 447; Phillips v. Claggett, 11 M. & W. 84; Rawstorne v. Gandell, 15 M. & W. 304.

(*y*) Giddings v. Coleman, 12 N. H. 153; Langley v. Berry, 14 N. H. 82; Powles v. Dilley, 2 Md. Ch. 119.

(*z*) Littlefield v. Smith, 17 Maine, 327, 328; Shaw C. J. in Warren v. Copelin, 4 Met. 598; Parsons C. J. in Dix v. Cobb, 4 Mass. 511, 512; Sewall C. J. in Brown v. Maine Bank, 11 Mass. 158; Spring v. So. Car. Ins. Co. 8 Wheat. 268. The assignment need not, however, although in writing, express to be for value received. Johnson v. Thayer, 17 Maine, 401; Legro v. Staples, 16 Maine, 252; Adams v. Robinson, 1 Pick. 461. In Connecticut an

[We have already seen that the assignee of a *chose in action* may sue upon it in his own name, if the debtor, upon being notified of the assignment, has promised to pay the debt to him. But in such a case the debtor is precluded from setting off demands he holds against the assignor, though due at the time of the assignment, unless, when making the promise to the assignee, the debtor has stipulated for a deduction of his counter claims. (a)]

There are some contracts which are exceptional to the general rule of the common law, and are assignable, so that the assignee is entitled to sue upon them in his own name ; Contracts assignable at law. of which the following are instances :

The contracts arising on bills of exchange are exceptions to the general rule that a contract is not assignable, founded Bills of exchange. on the custom of merchants. (b) The custom of merchants, or the law merchant, is judicially ascertained and recognized without proof, and evidence of particular usage of merchants is not admissible to the contrary. (c) By the law merchant a bill of exchange made payable to order is assignable by indorsement, so as to vest the right of payment in the indorsee and entitle him to sue upon it ; a bill of exchange made payable to bearer, or a bill of exchange made payable to order and indorsed in blank, is assignable by mere delivery, and conveys the right to the holder for the time being ; unless a bill of exchange is made payable to order or to bearer, it is not negotiable. (d)

At common law promissory notes were considered merely as evidence of a debt ; the promisee could not sue upon Promissory notes. the promise therein contained without proof of a consideration for the promise ; and such instruments were not assignable within the custom of merchants. (e) By the statute 4 Anne, c. 9, it was enacted that such notes " shall be assignable or indorsable

assignment is perfected or takes effect, as against *bonâ fide* creditors and purchasers, only from the time of notice to the debtor. Shaw C. J. in *Warren v. Copelin*, 4 Met. 594 ; *Vanbuskirk v. Ins. Co.* 14 Conn. 141. And, therefore, a trustee process served on the debtor before such notice, would prevail against the assignment. *Warren v. Copelin*, 4 Met. 594.

(a) *Parker C. J.* in *Mowry v. Todd*, 12 Mass. 284 ; *Wiggin v. Damrell*, 4 N. H. 69 ; *Thompson v. Emery*, 27 N. H. 269 ;

Stiles v. Farrar, 18 Vt. 444 ; *Elliott v. Callan*, 1 Penn. 24 ; *Lane v. Winthrop*, 1 Bay, 116 ; *King v. Fowler*, 16 Mass. 397.

(b) See *Hansard v. Robinson*, 7 B. & C. 90, 94.

(c) *Edie v. East India Co.* 2 Burr. 1216 ; *Barnett v. Brandao*, 6 M. & Gr. 630, 665 ; *Brandao v. Barnett*, 3 C. B. 530, 535.

(d) *Byles on Bills* (9th Eng. ed.), 80, 142.

(e) *Clerke v. Martin*, 2 Ld. Raym. 757.

[over in the same manner as inland bills of exchange are or may be according to the custom of merchants." The effect of this statute is to place bills of exchange and promissory notes on precisely the same footing with respect to their negotiability. (*f*)

The assignment of a negotiable instrument^e by the custom of merchants is more effectual than the mere assignment of a *chose in action* in equity, in that if taken *bonâ fide* and for value, and before it is due, it gives the holder a good title, notwithstanding any defects in the title of previous holders of which he has no notice at the time of taking it; but if a person takes a negotiable instrument without value, or when overdue, or with notice, he takes it subject to all the equitable rights of previous parties to the instrument, which have arisen respecting it. (*g*) Where a person took an instrument, which was negotiable by indorsement only, by mere delivery without indorsement, it was held that he was in the position of a merely equitable assignee, and subject to all the equities of the maker of the instrument against the assignor, and that his title could not be made good by a subsequent formal instrument, after notice of such equities; so that the instrument having been obtained from the maker by fraud, he could not recover upon it. (*h*)

A bill of lading is the document signed by the master of a ship upon the shipment of goods for carriage, acknowledging the receipt of the goods, and undertaking to deliver them to the consignee, or his assigns, upon payment of freight as stipulated for in the document. By the common law the assignment of the bill of lading transfers the property in the goods to the assignee; (*i*) but the contract expressed in the bill of lading was not assignable at common law, so that the assignee or indorsee of the bill of lading could not sue the master of the ship upon it; (*j*) nor could the assignee or indorsee of the bill of lading, as such, be sued upon the contract contained in it. If the assignee of the bill of lading claimed and accepted the goods under it, such acceptance

(*f*) See *Foster v. Dawber*, 6 Exch. 839, 6 East, 21; 1 Smith Lead. Cas. (5th Eng. ed.) 681; *Byles on Bills* (9th Eng. ed.), 5.

(*g*) Per Cresswell J. in *Sturtevant v. Ford*, 4 M. & Gr. 101, 106; *Byles on Bills* 9th Eng. ed., 117, 161.

(*h*) *Whistler v. Forster*, 14 C. B. N. S. 248. (*j*) *Lickbarrow v. Mason*, 2 T. R. 63; *Thompson v. Doming*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297.

(*i*) *Lickbarrow v. Mason*, 2 T. R. 63;

[of the goods would be evidence of a contract by him to pay freight and other charges according to the terms of it; (*k*) and if the bill of lading expressed that the freight or other charges should be payable "as per charter-party," the assignee receiving the goods under the bill of lading might become bound by the charter-party, so far as it was incorporated by reference in the bill of lading. (*l*) The indorsee of a bill of lading, taking it *bonâ fide* and without notice, becomes entitled to the goods, freed from the right of stoppage *in transitu*, and all other rights and charges against the goods, or in respect of the carriage, except those specified in the bill of lading. (*m*) The rights and liabilities of the indorsee under the bill of lading continue only so long as he is the holder, and cease upon indorsement of the bill to another. (*n*) But the original shipper does not get rid of his liability to pay freight by indorsement of the bill of lading; (*o*) unless the ship-owner accepts an indorsement conditional upon discharging him. (*p*) It seems that the indorsement of a bill of lading will pass to the indorsee the right of action for a breach of the contract contained in the bill of lading which has accrued before the indorsement. (*q*)

SECTION III.

Of Parties by Novation.

We come next to consider the subject of novation; the rules applicable to and governing which have long been generally well settled in the law, though the title itself is somewhat modern in English and American jurisprudence.

The term is derived from the civil law. Pothier (*a*) says of it: "A novation is a substitution of a new debt for an old. The old debt is extinguished by the new one con-
Meaning of term.

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| (<i>k</i>) <i>Jevon v. Solly</i> , 4 Taunt. 52; <i>Stindt v. Roberts</i> , 5 D. & L. 460; 17 L. J. Q. B. 166; <i>Moller v. Young</i> , 5 El. & Bl. 755; <i>Chappel v. Comfort</i> , 10 C. B. N. S. 803. | (<i>n</i>) <i>Smurthwaite v. Wilkins</i> , 11 C. B. N. S. 842. |
| (<i>l</i>) <i>Sanders v. Vanseller</i> , 4 Q. B. 260; <i>Megener v. Smith</i> , 15 C. B. 285; <i>Smith v. Sienecking</i> , 4 El. & Bl. 945; S. C. 5 El. & Bl. 589. | (<i>o</i>) <i>Fox v. Nott</i> , 6 H. & N. 630. |
| | (<i>p</i>) <i>Lewis v. M'Kee</i> , 36 L. J. Exch. 6; L. R. 2 Exch. 37. |
| | (<i>q</i>) <i>Short v. Simpson</i> , L. R. 1 C. P. 248; 35 L. J. C. P. 147. |
| (<i>m</i>) <i>Lickbarrow v. Mason</i> , <i>supra</i> ; <i>Foster v. Colby</i> , 3 H. & N. 705; <i>Shand v. Sanderson</i> , 4 H. & N. 381. | (<i>a</i>) Pothier Cont. pt. 3, art. 3, ch. 2, § 1. |

tracted in its stead, (b) for which reason a novation is included amongst the different modes in which obligations are extinguished."

Within this definition a novation may take place where, without the intervention of any new person, a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. (c) As where a debtor gives his promissory note to his creditor, upon an express agreement by the creditor to receive it in satisfaction of the preëxisting debt, the original debt becomes thereby extinguished, and a novation takes place. (d)

It may take place without intervention of any new person.

A novation may arise from the intervention of a new debtor. (e)

Intervention of new debtor.

Where B. owes C., and as a part of some new and independent transaction between B. and A., the latter promises to pay the amount of B.'s debt to C. and C.

(b) Although personal contracts cannot in general, strictly and technically speaking, be assigned so as to give the assignee a right of action upon them in his own name, yet a new contract may, in the case of simple contracts, be substituted for the old one, so as to produce, to a certain extent, the effect that an assignment would have, if sanctioned and recognized by the law. If, for example, a debtor has assented to the substitution of a new creditor, in lieu of the party with whom the debt was originally contracted, and the original liability is by consent of all parties extinguished in favor of the new liability to the new creditor, the latter is entitled to an action, in his own name, upon the new and substituted contract. See *Browning v. Stallard*, 5 Taunt. 450; *Patmore v. Colburn*, 16 M. & W. 65; *Taylor v. Hillary*, 1b. 241; *Turner v. Hardey*, 9 M. & W. 770; *Fiske v. McGregory*, 34 N. H. 414, 418. By the civil law a novation arose when any new contract was entered into with the intent to dissolve the former engagement, or a new debt was substituted for an old one. The old contract or debt was held to be extinguished by the new one contracted in its stead; whence a novation was included by the civilians amongst the different modes in which obligations were extinguished and discharged. *Instit. lib. 3, tit. 30, De Novatione*; *Cod.*

lib. 8, tit. 42, sec. 8; *Dig. lib. 46, tit. 2, De Novationibus*.

(c) *Pothier Cont. pt. 2, c. 2, art. 1*. To render it a valid novation, it is necessary that the act should contain something different from the former obligation. *1b. art. 4*.

(d) *Story Prom. Notes*, §§ 104, 105, 438; *Woodbury J. in Wright v. First Crockery Ware Co.* 1 N. H. 281; *Just. Inst. lib. 3, tit. 30, § 3*; *Whitcomb v. Williams*, 4 Pick. 228; *Dewey J. in Huse v. Alexander*, 2 Met. 157, 162; *Good v. Cheesman*, 2 B. & Ad. 328; *Gerrard v. Woolmer*, 8 Bing. 258; *Johnson v. Cleaves*, 15 N. H. 332; *Hunt v. Boyd*, 2 Miller (Louis.), 109; *New York State Bank v. Fletcher*, 5 Wend. 85; *Dougal v. Cowles*, 5 Day, 511; *Darlington v. Gray*, 5 Whart. 487; *Weakley v. Bell*, 9 Watts, 273. But in New York it seems to be settled, that the acceptance of the note of the debtor, in payment and satisfaction, is, in law, but conditional payment, and if not paid, the creditor may put it aside, and sue on the original cause of action. *Putnam v. Lewis*, 8 John. 389; *Frisbie v. Larned*, 21 Wend. 450, 452; *Hawley v. Foote*, 19 Wend. 516; *Cole v. Sackett*, 1 Hill, 517. See *Patapasco Ins. Co. v. Smith*, 6 Harr. & J. 166; *Gallagher v. Roberts*, 2 Wash. C. C. 191, 193.

(e) Another kind of novation, says Po-

[assents to the arrangement, accepts A. as his debtor and discharges B., a new debt arises between A. and C., (*f*) and a novation takes place. But it is absolutely necessary, in this case, that the original liability of B. to C. should be extinguished. (*g*)

Original liability must be extinguished.

thier, "is that which takes place by the intervention of a new debtor, where another person becomes debtor in my stead, and is accepted by the creditor, who thereupon discharges me from it. The person thus rendering himself debtor for another, who is in consequence discharged, is called *expromisor*, and this kind of novation is called *ex promissio*." Cont. pt. 3, c. 2, art. 1.

(*f*) This promise of A. to pay C. is not within the provision of the statute of frauds requiring a special promise to answer for the debt of another to be in writing. *Barker v. Bucklin*, 2 Denio, 45; *Dearborn v. Parks*, 5 Greenl. 81; *Rowe v. Whittier*, 21 Maine, 545, 549, 550; *Shaw C. J. in Pike v. Brown*, 7 Cush. 133, 136; *Rice v. Carter*, 11 Ired. (N. C.) 298; *Robbins v. Ayres*, 10 Missou. 538; *Farley v. Cleveland*, 4 Cowen, 432; *Ellwood v. Monk*, 5 Wend. 235; *Hilton v. Dinsmore*, 21 Maine, 410, 413, 414; *Maxwell v. Haynes*, 41 Maine, 559. It is clearly settled, that, if by the arrangement between the parties, the original debt is discharged, the new promise is good without writing. *Shaw C. J. in Curtis v. Brown*, 5 Cush. 492; *Stone v. Symmes*, 18 Pick. 467, 469; *Bird v. Gammon*, 3 Bing. (N. C.) 883; *Goodman v. Chase*, 1 B. & Ald. 297; *Butcher v. Stewart*, 11 M. & W. 857; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Draughan v. Bunting*, 9 Ired. (N. C.) 10; *Forth v. Stanton*, 1 Wms. Saund. 211, note (2); *Anstey v. Marden*, 4 B. & P. 124; *Browning v. Stallard*, 5 Taunt. 450; *Lane v. Burghart*, 1 Ad. & El. (N. S.) 933; *Nelson v. Boynton*, 3 Met. 396, 400. And it follows that, as, in every case of novation, there must be a discharge of the original liability, no case of novation will be invalid because within the above provision of the statute of frauds.

(*g*) *Cuxon v. Chadley*, 3 B. & C. 591;

Cochrane v. Green, 9 C. B. N. S. 448; *Butterfield v. Hartshorn*, 7 N. H. 345. In this last case, it appeared that Butterfield was a creditor of the estate of a person deceased, and the executor caused a farm belonging to the estate to be sold, and left a portion of the purchase-money in the hands of Hartshorn, the purchaser, to pay Butterfield and other creditors certain debts, which Hartshorn agreed to pay; but it was held, that, inasmuch as Butterfield had never assented to this arrangement prior to his suit, or agreed in any manner to accept Hartshorn as his debtor, and extinguish his claim against the executor, he could not maintain this action for the money so left in Hartshorn's hands for him. Upham J. said: "By agreement between the executor and the defendant, the defendant retained a portion of the purchase-money, for the purpose of paying the debts of certain creditors of the estate, among which was the debt due the plaintiff; and if there is sufficient privity between the defendant and the plaintiff, the purchase-money so retained is the plaintiff's money, for which the defendant is liable to him in an action for money had and received to his use. As between the plaintiff and defendant, it is the same as if the land had been paid for, and the executor had then deposited a portion of the purchase-money with the defendant, directing him to pay certain debts due from the executor, and which the defendant promised to pay. "But the principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant to the executor, he never having agreed to accept the defendant as his debtor, nor having made any demand of him for the money prior to the commencement of this suit. "It seems clear that no contract of the kind here attempted to be entered into can be made, without an en-

[A novation may arise from the intervention of a new cred-

itor change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt,—an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor betwixt the person holding the money and the individual who is to receive it. On any other supposition there would be a duplicate liability for the same debt; and the deposit, instead of being a payment, would be a mere collateral security, which is totally different from the avowed object of the parties. “A suit to recover money is no more decisive evidence of an election to receive it than a demand; and the bringing of a suit cannot be considered evidence of an assent to a contract, and thereby support the action which had no foundation until it was brought. “To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, anything can operate as an extinguishment of the original debt but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim. A contract of this description is an extinguishment of the original debt. *Cuxton v. Chadley*, 3 B. & C. 591.” *Warren v. Batchelder*, 15 N. H. 129, adopted the same view of the law, and was decided on similar principles. In that case it appeared that Batchelder (the defendant) owed one Dow, who owed Warren (the plaintiff). Dow and Batchelder had a settlement, in which Dow left in Batchelder's hands money enough to pay Dow's debt to Warren, who demanded the money of Batchelder, and brought an action against him for money had and received. Warren was not a party to the arrangement between Dow and Batchelder, and

his debt against Dow was not extinguished. It was held, that as Warren's debt still remained against Dow, and as no consideration moved from him, he could not maintain the action. Gilchrist J. said: “That the legal interest in a simple contract, and the right to enforce it, reside in the person from whom the consideration moves, we understand to be a cardinal point in the law. A contrary decision involves the result, that he from whom the consideration moves is not the party to sue, if any other person is intended to be benefited by the contract. And it is to be observed that *Heaton v. Angier* (7 N. H. 397), *Butterfield v. Hartshorn* (*ubi supra*), *Tatlock v. Harris* (3 T. R. 180), *Wilson v. Coupland* (5 B. & Ald. 228), *Cuxton v. Chadley* (*ubi supra*), and *Wharton v. Walker* (4 B. & C. 163), all recognize the principle that the party must sue who furnishes the consideration, which consideration was upon the facts of those cases, the extinguishment of the plaintiff's debt. In the case before us the consideration did not move from the plaintiff. His debt was not extinguished, and he can maintain no action. We do not mean to say that there must have been an express agreement by the plaintiff to accept the defendant as his debtor, and extinguish his original debt; but such an agreement must be proved, either by direct evidence or by proof of facts which show that it must have been made.” In *Wharton v. Walker*, 4 B. & C. 163, one Lythgoe was indebted to the plaintiff in a certain sum, and gave the plaintiff an order for that sum upon the defendant, who was his tenant, to be paid out of the next rent that became due. When the next rent became due, Lythgoe left in the hands of the defendant the amount due to the plaintiff, and gave a receipt for the whole rent; and the defendant promised to pay the plaintiff, who afterwards brought an action for money had and received. It was held, that the action could not be maintained, because the plaintiff's debt against Lythgoe was not discharged. Bayley J. said, that if

[itor. (*h*) Where B., having a claim against A. sells and assigns it to C., and A. promises C. to pay him the amount thereof, C. becomes a substituted creditor, and the promise is binding upon A. By this arrangement A.'s liability to B. is extinguished. (*i*)

Intervention
of new cred-
itor.

by an agreement betwixt the three parties, the plaintiff had undertaken to look to the defendant, and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement; but, in order to give that right of action, there must be an extinguishment of the original debt. But no such bargain was made in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue Lythgoe. In *Barker v. Bucklin*, 2 Denio, 45, the facts were, that the defendant's brother owed the plaintiff a sum of money, and, being pressed for payment, delivered to the defendant a pair of horses valued at a price somewhat less than the amount of the debt, and the defendant agreed to pay the amount of the price to the plaintiff on account of his demand against his brother. Jewett J. said: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the party making the promise to a particular person designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the statute of frauds, than it would have been if the defendant had promised to pay the price of the horses directly to his brother from whom he purchased them." The plaintiff was nonsuited, however, because he had declared upon a promise made by defendant to himself, whereas it did not appear that the plaintiff had accepted the proposition, so as to establish an understanding between himself and the defendant. In *Meert v. Moccard*, 1 Moore & P. 8, the defendant, having, as administrator of an estate, received a sum of money, which it was agreed by the parties entitled to it was to be applied in discharge of the funeral expenses of the testator's widow, which had been paid by the plaintiff, promised so to apply it; the plaintiff was held

entitled to recover it in an action for money had and received. Many cases have preceded to a much greater extent, so that it seems to have been established, by a series of decisions in several states, that a creditor, for whose benefit money has been placed in the hands of a third person by his debtor, upon a promise, express or implied from the circumstances, made by the third person to the debtor, to pay the money to the creditor, such third person can maintain an action to recover it, although there may have been no understanding between the creditor and such third person previous to the action, and no express promise to the creditor, and although there has been no release of the debtor. See *Delaware & Hudson Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Barker v. Bucklin*, 2 Denio, 45; *Weston v. Barker*, 12 John. 276; *Neilson v. Blight*, 1 John. Cas. 205; *M'Menomy v. Ferrers*, 3 John. 82; *Beers v. Robinson*, 9 Barr, 229; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, 17 Mass. 400; *Fitch v. Chandler*, 4 Cush. 255; *Fleming v. Alter*, 7 Serg. & R. 295; *Disborn v. Denoby*, 1 D'Anv. Abr. 64; *Ellwood v. Monk*, 5 Wend. 235; *Felton v. Dickinson*, 10 Mass. 287; *Brewer v. Dyer*, 7 Cush. 340; *Dearborn v. Parks*, 5 Greenl. 81. These cases, however, depend upon peculiar principles of their own, without any special reference to novation. A novation, as understood in the civil law, would not arise out of such a state of circumstances.

(*h*) A "kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, contracts some obligation in favor of a new creditor." Pothier Cont. pt. 3, c. 2, art. 1.

(*i*) Mr. Justice Story, in his work on Partnership, § 254, says: "If, upon a

[A novation may also arise from the intervention of both a new debtor and a new creditor in the same arrangement. This involves the principles of both the two last modes of novation. As, where A. owes B. and B. owes C.,

change in the members of a copartnership firm, the existing debts due to the partnership should be assigned over to the new firm, and after such assignment, with full knowledge thereof, the debtors should assent thereto, and promise payment to the new firm, that would amount by operation of law, to an extinguishment of the liability to the old firm, and to a transfer of the debts to the new firm; so that the old firm would be no longer entitled to sue therefor, but the right would be exclusively vested in the new firm." In a joint action by two plaintiffs, upon an account stated, it appeared that the defendant was indebted to Moor, one of the plaintiffs, in a large sum of money, and afterwards the other plaintiff was admitted a partner with Moor, and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it was agreed that all the money due to Moor, before his partnership with the other plaintiff, should be taken into that account, and that the balance should be paid to both the plaintiffs; and it was held that the action was properly brought by them jointly. *Moor v. Hill*, 2 Peake, 10; *Armsby v. Farnam*, 16 Pick. 318. But if there had been no special agreement or consent on the part of the defendant to substitute the one creditor for the other, the plaintiffs would not, by reason of any agreement among themselves, have been entitled to join in the action. *Welsford v. Wood*, 1 Esp. 180; *Armsby v. Farnam*, 16 Pick. 318. These decisions stand upon the ground that, by the agreement, the liability to the old firm was extinguished, and that to the new firm was substituted. *Collyer Partn.* § 650; *Story Partn.* §§ 244, in note, 254. See *Barger v. Collins*, 7 Harr. & J. 213. In *Mowry v. Todd*, 12 Mass. 234, Parker C. J. said: "Whatever may be the effect of handing over a writ-

ten contract to a party, to whom it is intended to be transferred, without a recognition of the transfer by the person bound by the contract, and a promise to pay the contents to a holder, we are satisfied that with such recognition and promise the assignment is sufficient without the name of the assignor. It amounts to a substitution of one creditor for another by the consent of the two creditors and the debtor, and an action may be maintained by such assignee, in his own name, founded on the assignment and the express promise of the debtor to pay him." The suggestion in this case that such an arrangement amounts to a substitution of one creditor for another, by the consent of the creditors and the debtor, was noticed with approbation by Hubbard J. in *Dennis v. Twitchell*, 10 Met. 184. In *Derby v. Sanford*, 9 Cush. 263, it appeared that Sanford and Derby entered into an entire contract, by which Derby was to do a specific piece of work for Sanford. Before it was completed, Derby addressed to Sanford the following note: "I hereby authorize R. Reed to finish the job already commenced . . . and to take the balance, whatever may be due;" and Sanford indorsed thereon, "whatever may be due on the within job when completed, as per agreement, shall be paid to R. Reed." To this R. Reed assented. Derby subsequently brought an action against Sanford on the contract in his own name, and it was held, that the action could not be maintained. Shaw C. J. said: "The doctrine of the assignment of choses in action does not arise here. There is no doubt that it is the law, that when an assignment of a debt is made, and the debtor agrees to pay the assignee, the assignment is a good consideration for the new promise, and an action may be maintained in the name of the assignee. It follows that if the debtor pays the assignee, such payment is a good defence to an ac-

[and they meet together and make a mutual arrangement, by which B. is discharged and A. becomes C.'s debtor. (j)] The new debt

tion by the assignor. There are several cases to this point. That of *Mowry v. Todd*, 12 Mass. 281, is the leading one." The arrangement in this case "was not the assignment of a *chose in action*, for there was no debt due to Derby, and of course no *chose in action* to be assigned. It was the substitution of Reed for Derby, as the contracting party with Sanford, to which Reed assented by taking the order and going on to complete the work. The defendant (Sanford), by his indorsement of the order, undertook that the balance for the job, when completed as per agreement, should be paid to Reed. The completion of the job by Reed was a good consideration for such express promise, but in addition to that, the defendant (Sanford), by the substitution, was wholly discharged from his contract to pay Derby anything. When the job was completed, we think Reed was the only creditor, and he alone could bring the action." See per Richardson C. J. in *Wiggin v. Damrell*, 4 N. H. 69, 75. Mr. Metcalf, — now Mr. Justice Metcalf, — in his article on contracts, 21 Am. Jurist, 284, says: "The English books mention a consideration as necessary to entitle the assignee thus to sue. 1 Saund. 210, n. (1); but in Massachusetts such express promise is sometimes said to be supported by the *moral obligation* of the promisor, arising from the original debt, &c., and notice of the assignment" (*Crocker v. Whitney*, 10 Mass. 319, referring to *Andover &c. Turnpike v. Gould*, 6 Mass. 43, where it is assumed that a *moral obligation* is sufficient to support an express promise, — a doctrine long since exploded): "A much sounder and more satisfactory basis for the consideration of such promise, would seem to be the discharge of the original claim. Such a discharge is necessarily implied as a condition of the promise, or as an effect of its performance." See Rand's note to *Crocker v. Whitney*, 10 Mass. 316, 322; *Liversidge v. Broadbent*, 4 H. & N. 603. By the as-

signment all the *equitable* interest, and, by the new promise of the debtor, the *technical legal* interest is vested in the assignee; and thence the right of the assignee is complete, both in equity and at law, and, of course, to the same extent and in an equal degree, the assignor is divested of interest, and the debtor is discharged from liability to him. See 2 Story Eq. Jur. § 1039; *Tiernan v. Jackson*, 5 Peters (U. S.), 597, 598; *Clark v. Thompson*, 2 R. I. 146, 150. If, then, when it is said that the assignment is a good consideration for the new promise of the debtor, it is meant to include this effect of the assignment and the new promise, there can be no objection to the proposition. The action against the debtor is upon the new promise to the assignee. *Currier v. Hodgson*, 3 N. H. 82. The obligor in a bond may be sued *in assumpsit* upon a promise to perform, made by him to an assignee thereof, and the assignee may bring his action in his own name. *Warren v. Wheeler*, 21 Maine, 484. Cases arising under this head of novation, are not within the statute of frauds relating to a promise to answer for the debt of another. *Hodgson v. Anderson*, 3 B. & C. 842.

(j) *Tatlock v. Harris*, 3 T. R. 174; *Thompson v. Percival*, 5 B. & Ad. 925; *Bird v. Gammon*, 3 Bing. (N. C.) 889; *Cochrane v. Green*, 9 C. B. N. S. 448. This case comes more especially under that particular kind of novation, which Pothier calls a "*delegation*," and which he thus defines: "Delegation is a kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him. Delegation is made by the concurrence of three parties, and there may be a fourth. It includes a novation, by the extinction of the debt from the person delegating, and the obligation contracted in his stead by the person delegated. Commonly, indeed, there is a

[created between A. and C. is a novation. A. has C. instead of B. for a creditor, and C. has A. instead of B. for a debtor, and B. is disengaged from both. (*k*)

The defendants being indebted to T. & Co., in the sum of 768*l.*, and T. & Co. being indebted to the plaintiffs in a much larger amount, it was agreed by all of them, that the defendants should pay to the plaintiffs the amount of their debt to T. & Co.; and it was held that the plaintiffs might maintain an action in their own name against the defendants for the amount of the debt, as all the parties interested had mutually assented to the change of liability, and the defendants had expressly agreed to pay the amount of their debt to the plaintiffs. (*l*) So in another case, Heaton sold Angier a wagon. Afterwards Angier sold the wagon to Chase, who agreed to pay Heaton the price, which Angier had agreed to pay Heaton for the wagon; and Heaton agreed to take Chase for his debtor for that price. It was held that this created a new contract between Heaton and Chase, and that the debt against Angier was extinguished, and he was no longer liable to Heaton. (*m*) This was decided upon the authority of the case put by Buller J. in *Tatlock v. Harris*, (*n*) who said: "Suppose A. owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them, that A. shall pay C. the 100*l.*; B.'s debt is extinguished, and C. may recover the same against A." (*o*)

double novation, for the party delegated is commonly a debtor of the person delegating; and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated by the new obligation, which he contracts." Pothier Cont. pt. 3, c. 2, art. 6, ss. 1, 2; Cont. Sale, pt. 6, c. 4, s. 553. See *Van Epps v. McGill, Hill & Denio* (N. Y.), 109.

(*k*) See *Hodgson v. Anderson*, 3 B. & C. 842. ●

(*l*) *Wilson v. Coupland*, 5 B. & Ald. 228.

(*m*) *Heaton v. Angier*, 7 N. H. 397. Green J. said: "Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff (Heaton)

should take Chase as his debtor for the sum due from the defendant (Angier). The debt due from the defendant to the plaintiff was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon. The agreement of the plaintiff to take Chase as his debtor was clearly a discharge of the defendant." See *Browning v. Stallard*, 5 Taunt. 450; *Warren v. Batchelder*, 15 N. H. 129; *Butterfield v. Hartshorn*, 7 N. H. 345; *Fiske v. McGregory*, 34 N. H. 414; *King v. Hutchins*, 23 N. H. 561.

(*n*) 3 T. R. 174, 180. See *Israel v. Douglas*, 1 H. Bl. 239.

(*o*) See *Hodgson v. Anderson*, 3 B. & C. 842. In the case put by Mr. Justice Buller, as stated in the text, C. releases

[The extinction of both the intermediate original liabilities is a sufficient consideration to bind each of the respective parties to his portion of the new arrangement. And this extinguishment is necessary to give full effect to the transaction and create a complete novation. (*p*)

Consideration.

Extinction of both the intermediate liabilities.

B., in consideration of being furnished by him with a new debtor in the person of A.; B. releases A., in consequence of A.'s promise to pay C., which releases B. from C. A. promises C., in consequence of being released from B.; and C. has a right to take advantage of that promise, because, by force of the arrangement, he has released B. in obtaining it. The receipt of a promissory note of a third person in payment of a debt will amount to a positive extinguishment of the original debt, by way of novation, as well by our law as by the foreign law, if so intended by the parties. *Story Prom. Notes*, §§ 404, 438; *Lord Kenyon C. J. in Owenson v. Morse*, 7 T. R. 64; *Kearslake v. Morgan*, 5 T. R. 513; *Johnson v. Weed*, 9 John. 310. So, if a creditor of a partnership firm receives the note of one of the co-partners for the amount of the debt due from the firm, this will extinguish the original debt and discharge the others, if such was the intent and agreement of the parties. *Iligins v. Packard*, 2 Hall (N. Y.), 547; *Marshall C. J. in Sheehy v. Mandeville*, 6 Cranch, 253; *Thompson v. Percival*, 5 B. & Ad. 925; *Reed v. White*, 5 Esp. 122; *Evans v. Drummond*, 4 Esp. 89; *Mellen C. J. in Wilkins v. Reed*, 6 Greenl. 220; *Chapman v. Durant*, 10 Mass. 47; *Harris v. Lindsay*, 4 Wash. C. C. 98, 271; *Bernard v. Torrance*, 5 Gill & J. 383; *Isler v. Baker*, 6 Humph. 85; *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Hart v. Alexander*, 2 M. & W. 483; *Wildes v. Fessenden*, 4 Met. 12; *Collyer Partn. § 559 et seq.*; *Bytes Bills* (6th Eng. ed.), 35, 305, 306; *Poth. Cont. p. 3, c. 2, arts. 3 & 4, s. 5*. The same is true where the verbal agreement of one of several jointly liable, is received in express satisfaction of the joint liability; and this promise is not affected by the provision of the statute of frauds, requiring a promise to answer for the debt of another

to be in writing. *Stephens v. Squire*, 5 Mod. 205; *Howes v. Martin*, 1 Esp. 162; *Price v. Barry*, 2 Cranch C. C. 447; *Durham v. Manrow*, 2 Comst. 541; *Files v. McLeod*, 14 Ala. 611; *Aiken v. Duren*, 2 Nott & McCord (S. C.), 370.

(*r*) See *Baillie v. Moore*, 8 Ad. & El. 489; *Butterfield v. Hartshorn*, 7 N. H. 345; *French v. French*, 3 Scott N. R., 125; S. C. 2 M. & Gr. 554; *Thomas v. Shillibeer*, 1 M. & W. 124; *Phalan v. Stiles*, 11 Vt. 82. In cases where A. owes B., and B. owes C., and B. by an order or otherwise, assigns his claim against A. to C., in payment and discharge of his debt to C., this constitutes a novation, by the intervention of a new creditor and a new debtor. The debt which was due from B. to C. is extinguished, and, as has been shown, the liability from A. to B. is also extinguished. But, although it has been said in various treatises that the debt from A. to B. must be extinguished, yet the cases cited to prove it are not clear in support of the position. *Hodgson v. Anderson*, 3 B. & C. 842, certainly does not support it. In that case, *Bayley J.* said: "The debt existed, and it was the debt of the defendant, and the only question was to whom it was to be paid." In *Tatlock v. Harris*, 3 T. R. 174, 180, *Buller J.* says merely, that the debt due from B. to C. is extinguished. *Cuxon v. Chadley*, 3 B. & C. 591, only decides that it is necessary that the debt from B. to C. must be discharged. Such, also, was the decision in *Wharton v. Walker*, 4 B. & C. 163. Such, also, is the bearing of *Butterfield v. Hartshorn*, 7 N. H. 345, and *Heaton v. Angier*, 7 N. H. 397. The language of Mr. Justice *Story*, *Partn. § 254*, quoted above in note to "Novation by intervention of new creditor," implies the extinguishment of the liability of A. to B., but the continued existence of the debt itself in favor of C.

[If an order is addressed by a creditor to his debtor, directing him to pay the debt to a third person indicated, to whom the creditor is indebted, and the order is given to such third person in satisfaction of his debt, and presented by him to the debtor, to whom it is addressed, and assented to by the latter, this operates as a substitution of a new debt in the place of the original demand. But the mutual assent of the three parties is essential to the novation, because the original demand is not extinguished and annihilated, if the consent and concurrence of any one of the three are wanting. (q) After

to whom it has been assigned. On the other hand, Pothier says: "By this kind of delegation, the debt which the delegator owes to him to whom he makes the delegation, and that which the debtor delegated owes to the delegator, are entirely extinguished; and in the place of them a new debt, on the part of the debtor delegated, is contracted in favor of him to whom the delegation is made." Pothier Sale, pt. 6, c. 4, s. 553. The assignment of a debt is, of course, not an extinguishment of it; neither is there any novation in it. It is the old debt, which was due to the assignor, which subsists and which is transferred from the person of the assignor *non quidem ex juris subtilitate, sed juris effectu*, to the person of the assignee. Pothier Sale, pt. 6, c. 4, s. 553. The debt remains to be recovered in the name of the assignor. But if the debtor has assented to the assignment and promised to pay the assignee, a novation takes place, — a new debt arises, — and a suit brought upon it must be in the name of the assignee. In the former case, the specific debt assigned must be sued for; in the latter, the specific debt no longer exists as a ground of action; the action is founded on the new promise, in which the assigned debt is merged, rather, perhaps, than extinguished. See *Currier v. Hodgson*, 3 N. H. 82; *Warren v. Wheeler*, 21 Maine, 484.

(q) See *Hodgson v. Anderson*, 3 B. & C. 842; *Crowfoot v. Gurney*, 9 Bing. 372; *Williams v. Everett*, 14 East, 597; *Yates v. Bell*, 3 B. & Ald. 643; *Wilson v. Coupland*, 5 B. & Ald. 228; *Wharton v. Walker*,

4 B. & C. 164; *Gibson v. Cooke*, 20 Pick. 15; *Owen v. Bowen*, 4 C. & P. 93; *Enthoven v. Hammond*, 22 Eng. Law & Eq. 476; *Israel v. Douglas*, 1 H. Bl. 239; *Cuxon v. Chadley*, 3 B. & C. 594; *Hutchinson v. Heyworth*, 9 Ad. & El. 375; *Walker v. Roston*, 9 M. & W. 411; *Ford v. Adams*, 2 Barb. 349; *Baron v. Husband*, 4 Ad. & El. 611; *Maxwell v. Jameson*, 2 B. & Ald. 55; *Short v. City of New Orleans*, 4 Louis. Ann. 281; *McKinney v. Alvis*, 14 Ill. 34; *Scott v. Porcher*, 3 Meriv. 652; *Mandeville v. Welch*, 5 Wheat. 277. "When I indicate to my creditor," observes Pothier, "a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for that purpose, it is merely a mandate, and neither a transfer nor novation. I remain the debtor, and the person designated by the order does not become such in my stead. So where the creditor indicates a person to whom his debtor may pay the money, this indication does not include any novation; the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication." Pothier Cont. pt. 3, c. 2, art. 6, s. 4. By the common law there must be not only an assent on the part of the debtor to whom the order is addressed, but there must be also the express concurrence of the person in whose favor the order is made, manifesting his assent to the change of liability. If he is not a party to the contract, the original debt is not released and extinguished; there is no novation and can be no substi-

[the arrangement has been perfected by the assent of the three parties, neither can withdraw, but it is then binding alike on all. (*r*)

This promise by the intervening debtor to pay the intervening creditor, — or by A. to pay C. in the cases above stated, — is not within the provision of the statute of frauds requiring a promise to answer for the debt of another to be in writing. (*s*)

Not within the statute of frauds.

tution. In Justinian's Institutes, it is ordained : " Solum NOVATIONEM prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt ; alioqui et manere pristinam obligationem, et secundam ei accedere." Lib. 3, tit. 30, s. 3. See *Owen v. Bowen*, 4 C. & P. 93-96 ; *Taylor v. Lendey*, 9 East, 49 ; *Ellenborough C. J. in Surtees v. Hubbard*, 4 Esp. 203. A doubt is raised by Pothier and some of the civilians as to whether an order by a creditor upon a debtor, in favor of a third party, for less than the amount of the debt, accepted by the debtor, and paid to such third party, operates as an extinguishment of the whole debt, or only so much of it as is covered by the amount mentioned in the order ; and they treat it as a question of intention, to be determined by the circumstances of the particular case. But by the common law it is clear that it would be a discharge only *pro tanto*, in the absence of a special agreement founded upon sufficient consideration for the release and discharge of the residue of the debt. *Heathcote v. Crookshanks*, 3 T. R. 27 ; *Fitch v. Sutton*, 5 East, 230 ; *Pinnel's case*, 5 Co. 117 ; *Cumber v. Wane*, 1 Strange, 426 ; *Thomas v. Heathorn*, 2 B. & C. 477.

(*r*) *Hodgson v. Anderson*, 3 Barn. & Cr. 842 ; *Clement v. Clement*, 8 N. H. 472 ; *Crowfoot v. Gurney*, 9 Bing. 372 ; *Ainslie v. Boynton*, 2 Barb. (S. C.) 258 ; *Beecker v. Beecker*, 7 John. 103 ; *Norris v. Hall*, 18 Maine, 332 ; *Hodges v. Eastman*, 12 Vt. 358 ; *Israel v. Douglas* 1 H. Bl. 239 ; *Hutchinson v. Heyworth*, 9 Ad.

& El. 375 ; *Ainslie v. Boynton*, 2 Barb. (S. C.) 258 ; *Hodges v. Eastman*, 12 Vt. 358. In a case where the debtor or the depositary of money has assented to the order, drawn by the creditor in favor of a third person, to whom such creditor is indebted, and promised such third person, being the payee or remitte, to hold the amount specified at his disposal, the authority to pay the money is irrevocable, the original debt between the creditor and such third person is discharged, and none of the parties can then recede. The transaction is then said to fall within that class of cases where, when an order has been given to a person, who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement. *Walker v. Rostron*, 9 M. & W. 421 ; *Meert v. Moessard*, 1 M. & P. 11 ; *Baron v. Husband*, 4 B. & Ad. 611 ; *M'Carthy v. Colvin*, 9 Ad. & El. 617 ; *Peate v. Dicken*, 1 Cr. M. & R. 422 ; *Lacy v. M'Neille*, 4 Dow. & Ry. 7.

(*s*) *Hodgson v. Anderson*, 3 B. & C. 842 ; *Stephens v. Squire*, 5 Mod. 205 ; *Files v. M'Leod*, 14 Ala. 611 ; *Barker v. Bucklin*, 2 Denio, 45 ; *Dearborn v. Parks*, 5 Greenl. 81 ; *Shaw C. J. in Pike v. Brown*, 7 Cush. 133, and in *Curtis v. Brown*, 5 Cush. 492 ; *Bird v. Gammon*, 3 Bing. (N. C.) 883 ; *Goodman v. Chase*, 1 B. & Ald. 297 ; *Anstey v. Marden*, 4 B. & P. 131 ; *Browning v. Stallard*, 5 Taunt. 450 ; *Butcher v. Stewart*, 11 M. & W. 857 ; *Lacy v. M'Neille*, 4 Dow. & Ry. 7.

[SECTION IV.]

Of Parties under Covenants annexed to Estates in Land.

Covenants
annexed to,
or running
with estates
in land. Covenants of a certain kind may be annexed to estates in land, so that the benefit or the burden of the covenant passes to an assignee of the estate; the covenants are then said to run with the land.

The transfer of covenants real, (a) which run with the land, (b) forms an exception to the general rule of the common law, that contracts and covenants, being *choses in action*, cannot be assigned.

These, being created to protect and continue the estate, or interest to which they relate, and for the beneficial use and enjoyment of it, have been treated as annexed to the same, and, upon a transfer of that estate or interest, have been allowed, as an incident, but not as a separate and substantive matter of assignment, to pass with the particular estate or interest to which they have thus become attached. (c)

(a) A covenant real is that which has for its object something annexed to, or inherent in, or connected with land, or chattels real. 4 Cruise Dig. 371, tit. Deed, c. 26, s. 23. "The law does not require any particular form of words to constitute such a covenant." Per Wilde J. in Trull v. Eastman, 3 Met. 124. It may be express or implied. 4 Kent, 473. See per Lord Brougham, in Keppell v. Bailey, 2 My. & K. 517. It is confined to lands and tenements, excluding such hereditaments as do not embrace lands and tenements; and a privilege of drawing water from a pond comes within the exclusion. Wheelock v. Thayer, 16 Pick. 68; Mitchell v. Warner, 5 Conn. 497. It passes only by a conveyance of the estate or interest to which it is annexed. Pike v. Galvin, 29 Maine, 183. But it is not necessary that the act to which the covenant relates should be one to be done on the premises conveyed. Norman v. Wells, 17 Wend. 136; 2 Sugden V. & P. (8th Am. ed.) 577, note (a).

(b) "The distinction between covenants that are in gross, and covenants that

run with the land," says Mr. Chancellor Kent, "would seem to rest principally on this ground, that to make a covenant run with the land, there must be a subsisting privity of estate between the covenanting parties. A covenant to pay rent, or to produce title-deeds, or for renewal, are covenants of the latter character, and they run with the land." 4 Kent, 472, 473; Johns v. French, 1 Hogan, 450; Ross v. Turner, 2 English, 132.]

(c) Wilde J. in Hurd v. Curtis, 19 Pick. 459, 462, and in Morse v. Aldrich, 19 Pick. 449; Spencer's case, 5 Co. 16; Chase v. Weston, 12 N. H. 413. Being incidents only, these covenants pass with a conveyance of the principal subject, and with that alone. Pike v. Galvin, 29 Maine, 183, 186, and cases cited; Randolph v. Kinney, 3 Rand. 394; Plymouth v. Carver, 16 Pick. 185. If a deed conveys the possession of land, this is sufficient to carry the covenants. Fowler v. Poling, 6 Barb. 165; S. C. 2 Ib. 300; Slater v. Rawson, 6 Met. 439; Beddoe v. Wadsworth, 21 Wend. 120. But see Parker v. Brown, 15 N. H. 176. But if a grantor

[In general, if a covenant of this kind is made with the owner of an estate in land, the benefit of it passes by assignment with the estate of the covenantee. (*d*) It is not necessary to this result that the covenantor should have conveyed the land to the covenantee, or should have had any connection with the land; he may be a stranger to the land, except through the covenant; (*e*) but it is essential that the covenantee should be the owner of the estate in order that the covenant may become annexed to it. (*f*)

Covenants made with owner of estate.

It seems that the burden of a covenant of this kind made by the owner of real estate does not pass with the estate to the assignee, except in the case of covenants in leases. (*g*) The proprietor of a theatre covenanted with the plaintiff to allow him to have the free use of two of the boxes at the theatre for a certain period, and afterwards assigned his estate in the theatre to the defendant; it was held that the covenant was merely a personal covenant and did not run with the estate, as it did not pass an interest

has no seisin at the time of his conveyance, his covenant of warranty does not attach to the land, and, therefore, cannot run with it. *Slater v. Rawson*, 1 Met. 450.

(*d*) *Middlemore v. Goodale*, Cro. Car. 503; *Campbell v. Lewis*, 3 B. & Ald. 392.

(*e*) See *Spencer's case*, 1 Smith's L. C. (5th ed.) 43, 60; *Sharp v. Waterhouse*, 7 E. & B. 816; 27 L. J. Q. B. 70.

(*f*) Co. Lit. 385 a; *Webb v. Russell*, 3 T. R. 393; 1 Smith's L. C. (5th ed.) 62. To create a covenant, that will run with the land, there must be a privity of estate between the covenantor and covenantee. *Spencer's case*, 5 Co. 16; *Cole's case*, Salk. 196; *Bally v. Wells*, 3 Wilson, 29; *Morse v. Aldrich*, 19 Pick. 449, 453; *Webb v. Russell*, 3 T. R. 402; *Keppell v. Bailey*, 2 Mylne & K. 517; *Ross v. Turner*, 2 Eng. 132. See *Taylor v. Owen*, 2 Blackf. 301; *Plymouth v. Carver*, 16 Pick. 183; 2 Sugden V. & P. (8th Am. ed.) 576 *et seq.* Covenants for title may be considered as exceptions to the general rule, and for very strong reasons. Such a covenant is dependent on the grant, is annexed to it as part and parcel of the con-

tract, and runs with the land in favor of the assigns of the grantee or covenantee; but there is no exception to the rule, that no covenant will run with the land, so as to bind the assignee to perform it, unless there were a privity of estate between the covenantor and covenantee. *Wilde J.* in *Hurd v. Curtis*, 19 Pick. 463. Where such privity exists between the covenantor and covenantee, and the covenantor assigns his estate, the privity thereby created between the assignee and the other contracting party, renders the former liable on all such covenants as regulate the mode of occupying the estate, and the like covenants concerning the same. And so, if the covenantee assign his estate, his assignee will have the benefit of similar covenants, and may sue upon them in his own name. *Hurd v. Curtis*, 19 Pick. 459; 1 Chitty Pl. (9th Am. ed.) 16-18; *Spencer's case*, 5 Co. 16; *Middlemore v. Goodale*, Cro. Car. 503; Co. Litt. 385 a.

(*g*) See 1 Smith's L. C. (5th ed.) 63-74, where the point is discussed and the authorities collected; and see *In re Drew's Estate*, L. R. 2 Eq. 206; 35 L. J. C. 845.

[in any specific part of the theatre, or a license to enter and continue on any specific part. (*h*)

But the assignee of property, taking it with notice that the assignor has entered into covenants affecting the property, may be held bound by those covenants in equity. Thus, the purchaser of land with notice that the vendor had entered into restrictive covenants as to building, or carrying on trades, or the mode of using or enjoying the land, will be restrained from infringing such covenants, at the suit of the parties with whom, or for whose benefit, they were made. (*i*) So, where a person contracted to purchase land and afterwards obtained notice that the vendor had previously covenanted not to build upon it, it was held that he could not be compelled to specific performance of his contract, because, if he took the land, he would be bound by the covenant. (*j*) Where land is sold in plots for building, and the vendor grants each plot subject to a covenant by the purchaser of that plot restrictive of the mode of building upon it, equity will enforce the covenant in favor of and against the assignee of any of the plots. (*k*)

Constructive notice is sufficient to charge the purchaser of land with the burden of covenants affecting it; and, in general, a purchaser of freehold or of leasehold estates is bound to inquire into the title of his vendor, and will be affected with notice of what appears upon the title, if he does not so inquire; and this rule

(*h*) *Flight v. Glossopp*, 2 Bing. N. C. 125.

(*i*) *Whatman v. Gibson*, 9 Sim. 196; *Tulk v. Moxhay*, 11 Beav. 571; 2 Ph. 774; 18 L. J. C. 83; *Coles v. Sims*, 5 De G., M. & G. 1; 23 L. J. C. 258; *Eastwood v. Lever*, 33 L. J. C. 355; *Clements v. Welles*, L. R. 1 Eq. 200; 35 L. J. C. 265. It is not necessary, in order to justify the interference of the court in such cases, that the covenant should run with the land. *Parker v. Nightingale*, 6 Allen, 341, 344; *Western v. M'Dermot*, L. R. 1 Eq. 499; S. C. 2 Ch. Ap. 72; *Moxhay v. Inderwick*, 1 De G. & S. 708; *Barrow v. Richards*, 8 Paige, 351; *Feilden v. Slater*, L. R. 7 Eq. 523; 2 Dan. Ch. Pr. (4th Am. ed.) 1654. "The precise form or nature of the covenant or agreement is quite im-

material. It is not necessary that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." *Bigelow J.* in *Whitney v. Union Railway Co.* 11 Gray, 364. See *Catt v. Tourle*, L. R. 4 Ch. Ap. 654; 2 Sugden V. & P. (8th Am. ed.) 596, note (*m*).

(*j*) *Bristow v. Wood*, 1 Coll. 480.

(*k*) *Western v. M'Dermot*, L. R. 1 Eq. 499; 35 L. J. C. 190; 36 Ib. 76; *Eastwood v. Lever*, *supra*.

[applies to a tenant taking a term of years, or a tenancy from year to year. (l)]

By the common law covenants of a kind capable of running with the land, made between lessor and lessee of land, pass to the assignee of the term, so that he is liable to be sued and entitled to sue upon such covenants. (m) But according to the better opinion, such covenants in leases by the common law were not assignable with the reversion; and to remedy the inconveniences arising from this state of the law the statute 32 Hen. 8, c. 34, was passed, by which such covenants between lessor and lessee were also made or declared to be assignable with the reversion, so that the benefit and the burden of them pass to the assignee of the reversion. (n)

Covenants between lessor and lessee.

By that statute, after reciting "that by the common law no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereto," it is enacted (s. 1), to the effect that all persons, being grantees, or assignees of any reversion, shall have like advantage against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste, or other forfeiture, and by action only, for not performing other conditions,

Annexed to reversion by statute.

(l) *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; 35 L. J. C. 569; *Clements v. Welles*, L. R. 1 Eq. 200; 35 L. J. C. 265.

(m) *Campbell v. Lewis*, 3 B. & Ald. 392. Covenants entered into between landlord and tenant, lessee and reversioner, form a large class of those that run with the land. If the owner in fee of real property carves out of it a partial interest, such as a term of years, and enters into covenants affecting the value or enjoyment of the property by the lessee during the term, these covenants are annexed to the estate granted, they run with the land so long as that estate continues, and the right of action upon them, in case of breach, vests in the assignee of the term. Such are covenants by the lessor to repair, or to grant estovers to repair, or for fuel. *Spencer's case*, 5 Co. 17 b; *Bac. Abr. Covenant*, E. Div. 5; *Shelby v. Hearne*, 6 Yerger, 512; *Demarest v. Willard*, 8 Cowen, 206; *Allen v. Culver*, 3 Denio, 284; to cleanse and re-

pair water-courses; *Holmes v. Buckley*, Prec. Ch. 39; 1 Eq. Ca. Abr. 27, Pl. 4; to supply the demised premises with water; *Jourdain v. Wilson*, 4 B. & Ald. 266; to acquit the land of certain suits and charges; *Spencer's case*, 5 Co. 13 a; also covenants for renewal; *Roe v. Hayly*, 12 East, 464; *Simpson v. Clayton*, 4 Bing. (N. C.) 758; for quiet enjoyment; *Nokes v. Awder*, Cro. Eliz. 436; and all the usual covenants for title; *Campbell v. Lewis*, 3 B. & Ald. 392; S. C. 8 Taunt. 715; *Noke v. Awder*, Cro. Eliz. 436. "And of these covenants, assignees in deed or in law, and assignees of assignees *in infinitum*, shall take advantage, although not named therein." *Shep. Touch. c. 7*; *Morse v. Aldrich*, 19 Pick. 453, 454, per *Wilde J.*; *Lord C. J. Wilmot*, in *Bally v. Wells*, 3 Wilson, 25.

(n) See *Bickford v. Parson*, 5 C. B. 920, 930; 1 Wms. Saund. 240 a, note (a).

[covenants, or agreements, expressed in the indentures of leases, as the said lessors and grantors might have had. And by s. 2, it is enacted to the effect that all lessees and grantees of lands or other hereditaments for terms of years, life, or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons having any gift or grant of the reversion of the lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors. This statute applies only to leases by deed; (o) and it applies only to covenants of the kind which may run with the land. (p)]

If the covenant in the lease is not made with the person entitled to the reversion, it is not assignable; thus, where a mortgagor and mortgagee joined in leasing the mortgaged premises, and the covenants by the lessee were made with the mortgagor only, it was held that the assignee of the mortgagee was not entitled to sue upon them. (q) So, where a lease was made by a mortgagor, in which the previous mortgage was recited, so that there was shown to be no reversion in the mortgagor even by estoppel, the covenants were held to be not assignable. (r) So, if a husband and wife, being seised in right of the wife, lease, and the covenants are made with the husband only, they will not run with the reversion; (s) and if tenants in common severally demise their undivided interests, and the covenants are made with both jointly, or if joint tenants demise, and the covenants are made with one severally, it seems that such covenants are not assignable with the reversion. (t)

The right and liability of the assignee of the lessee upon covenants running with the land arises at common law out of his privity of estate with the lessee, a legal consequence of which is that all the actions by and against such assignee upon the covenants annexed to the term are *local*; but it is held that the statute 32 Hen. 8, c. 34, transfers the privity of contract, consequently the actions by and against

(o) *Brydges v. Lewis*, 3 Q. B. 603; *Standen v. Christmas*, 10 Q. B. 135; and *Wootton v. Steffenoni*, 12 M. & W. 129.

see *Bickford v. Parson*, *supra*.

(p) *Spencer's case*, 5 Co. 16.

(q) *Webb v. Russell*, 3 T. R. 393.

(r) *Pargeter v. Harris*, 7 Q. B. 708.

(s) *Thompson v. Hakewill*, 19 C. B. N. S. 713; 35 L. J. C. P. 18, 22.

(t) See per Parke B. *Ib.* 134; and see

[the assignee of the lessor, which are given by the statute are *transitory*. (u) The distinction is important in reference to the *venue* in such actions. (v)

' It is laid down that when the covenant extends to a thing *in esse* parcel of the demise, it is annexed and appurtenant to the thing demised, and shall go with the land; (x) as, if the lessee covenants to repair the premises demised, the covenant is annexed to the estate in the premises, and shall bind the assignee; (y) and such a covenant extends to new buildings erected during the term, which the assignee becomes liable by the covenant to repair as part of the demised premises. (z) A covenant in a lease of mines to build a new smelting mill, and keep it in repair, and so leave it at the expiration of the term, was held to be a covenant running with the term and the reversion, as tending to the support and maintenance of the premises, and the assignee of the reversion was held entitled to sue for a breach of the covenant. (a)

What covenants may be annexed to estates in land.

If the covenant concerns a thing which was not *in esse* at the time of the demise made, as a covenant to build a wall upon part of the demised premises, the covenant is not annexed and will not bind the assignee. It was resolved, however, that such a covenant, if made by the lessee for him and his assigns, would bind the assignee by the express words. (b) "But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not

Covenants collateral to the land.

(u) *Stevenson v. Lambard*, 2 East, 575, 580; *Thursby v. Plant*, 1 Wms. Saund. 240 a, note (a); *Mostyn v. Fabrigas*, 1 Smith's L. C. (5th ed.) 607, 635. See *Bullen & Leake, Prec. Pl.* (2d ed.) 183.

(v) See *Ib.*

(x) *Spencer's case*, 5 Co. 15.

(y) *Spencer's case*, 5 Co. 15; *Dean & Chapter of Windsor's case*, 5 Co. 24; *Shelby v. Hearne*, 6 Yerger, 512; *Demarest v. Willard*, 8 Cowen, 206; *Allen v. Culver*, 3 Denio, 284; *Thompson v. Shattuck*, 2 Met. 615; *Norman v. Wells*, 17 Wend. 148; *Pollard v. Shaffer*, 1 Dall. 210. So a covenant to rebuild on the land; *Allen v. Culver*, 3 Denio, 284.

(z) *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194.

(a) *Easterby v. Sampson*, 9 B. & C. 505; 6 Bing. 644.

(b) *Spencer's case*, *supra*, 2d Resolution; and see *Doughty v. Bowman*, 11 Q. B. 444; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; 35 L. J. C. 569. No reason is given for the alleged difference where the assigns are named; and it seems that the capacity of a covenant to be assigned with the land depends mainly, if not entirely upon the nature of the covenant, and not upon whether the assigns are named. See *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194; *Dailey v. Peck*, 6 Penn. L. Jour. 383; *Shaw C. J. in Hodges v. Saunders*, 17 Pick. 475.

[touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenant for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee." (c) A covenant not to cut down trees upon land during the currency of a lease, in which the trees were not included, is collateral to the land demised and does not pass with the land or the reversion. (d)

The ordinary covenants for title in a conveyance will run with the land, so that the benefit of them passes to successive owners of the estate. (e) So, the ordinary covenants

(c) *Spencer's case*, *supra*; and see *Vernon v. Smith*, 5 B. & Ald. 1, 7; *Raymond v. Fitch*, 2 Cr. M. & R. 588, 599.

(d) *Raymond v. Fitch*, 2 Cr. M. & R. 588, 599.

(e) All covenants concerning title run with the land conveyed, with the exception of those that are broken before the land passes. 4 Kent, 473; *Martin v. Baker*, 5 Blackf. 232; 2 Sugden V. & P. (8th Am. ed.) 577, note (g). The covenant of warranty, and the covenant for quiet enjoyment, in a deed of conveyance, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are therefore in the nature of real covenants, and they run with the land conveyed, and descend to heirs and vest in assignees or the purchaser. 4 Kent, 471; *Ross v. Turner*, 2 Eng. 132; *Heath v. Whidden*, 24 Maine, 383; *Martin v. Baker*, 5 Blackf. 232; *Brown v. Staples*, 28 Maine, 497; *Clark v. Swift*, 3 Met. 390; *Hunt v. Amidon*, 4 Hill, 345; *Suydam v. Jones*, 10 Wend. 180; *Withy v. Mumford*, 5 Cowen, 137; *Wyman v. Ballard*, 12 Mass. 306; *Sprague v. Baker*, 17 Mass. 586; *De Chaumont v. Forsythe*, 2 Penn. 507; *King v. Kerr*, 5 Ohio, 156; *Williams v. Beeman*, 2 Dev. 483; *Chase v. Weston*, 12 N. H. 417; 2 Sugden V. & P. (8th Am. ed.) 577, note (a). So it has been held as to a covenant, that neither the grantor nor his heirs shall make any claim to the land conveyed. *Fairbanks v. Williamson*, 7 Greenl. 96; *Trull v. Eastman*, 3 Met. 121. See, also, *Bennett v. Waller*,

23 Ill. 27; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297. But see *Pike v. Galvin*, 29 Maine, 183, 185, 186, overruling the case of *Fairbanks v. Williamson*. See, also, as opposed to *Fairbanks v. Williamson*, *Harriman v. Gray*, 49 Maine, 537; *Kimball v. Blaisdell*, 5 N. H. 533; *Comstock v. Smith*, 13 Pick. 116; *Dart v. Dart*, 7 Conn. 250; *Jackson v. Waldron*, 13 Wend. 178; *Kinsman v. Loomis*, 11 Ohio, 475; 2 Sugden V. & P. (8th Am. ed.) 556, note (y), 577, note (a). Where land, conveyed with covenants of warranty, has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantee or assignee, in whose possession the land was when the covenant was broken, can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor, until he himself has been compelled to pay damages on his own covenant; and until such damage has been paid by him, he cannot release such covenantor from his liability to the subsequent covenantees. *Chase v. Weston*, 12 N. H. 413; *Suydam v. Jones*, 10 Wend. 180; *Griffin v. Fairbrother*, 1 Fairf. 91; *Brown v. Staples*, 28 Maine, 497; *Thompson v. Shattuck*, 2 Met. 615; *Claunich v. Allen*, 12 Ala. 159; *Crooker v. Jewell*, 29 Maine, 527; *Kingdon v. Nottle*, 1 M. & Sel. 353; S. C. 4 Ib. 53; *Withy v. Mumford*, 5 Cowen, 137; *Slater v. Rawson*, 6 Met. 439. No one but the person holding the

[in a lease for quiet enjoyment, and for further assurance, will run with the land and with the reversion. (*f*) So, the warranty or covenants implied in words of demise; (*g*) which implied covenants, however, extend no further than the estate of the lessor. (*h*)

A covenant in a lease, to pay the rent reserved, runs, as to the burden of it, with the term, and, as to the benefit of it, with the reversion. (*i*) A covenant in a lease for renewal at the end of the term, will run with the land and with the reversion; (*j*) and so will a proviso for determining the term at the option of either party. (*k*) A covenant for renewal of a lease does not import that the renewed lease is to contain a similar covenant. (*l*) A covenant in a lease not to assign or underlet, or not to do so without the consent of the lessor, does not run with the term; if the lessor grants the term subject to the condition that it shall cease if the lessee assigns, an assignment by the lessee will be void; but if the lessor restrains the lessee from assigning by covenant only, though the lessee by assigning commits a breach of covenant, the assignment is not void, and the assignee is not bound by the covenant. (*m*) If an agreement is made for a lease to be granted subject to a condition or covenant against assignment, an

Covenants in leases.

estate can release the covenants running with it; *Chase v. Weston*, 12 N. H. 413, 418; but he may; *Middlemore v. Goodale*, Cro. Car. 503; *Brown v. Staples*, 28 Maine, 503; *Littlefield v. Getchell*, 32 Maine, 390; by an instrument of as high a nature as the deed containing them. *Kaye v. Waghorne*, 1 Taunt. 418; *Heath v. Whidden*, 29 Maine, 108. But the assignee of such a covenant will not be affected by any equities existing by parol between the covenantor and covenantee, even when their existence is known to him, before he becomes the purchaser of the land. *Eveleth v. Crouch*, 15 Mass. 307; *Suydam v. Jones*, 10 Wend. 180.

(*f*) *Middlemore v. Goodale*, Cro. Car. 503; *Noke v. Awdler*, Cro. Eliz. 373, 436; *Lewis v. Campbell*, 8 Taunt. 715; *Campbell v. Lewis*, 3 B. & Ald. 392; *Spencer's case*, 1 Smith L. C. (5th ed.) 43, 53.

(*g*) *Spencer's case*, *supra*; *Sheppard's Touchstone*, by Preston, p. 181, note (3); by the 8 & 9 Vict. c. 106, s. 4, "the word

'give,' or the word 'grant,' in a deed executed after 1 Oct. 1845, shall not imply any covenant in law, in respect of any tenements or hereditaments."

(*h*) *Adams v. Gibney*, 6 Bing. 656; *Penfold v. Abbott*, 32 L. J. Q. B. 67.

(*i*) *Sacheverell v. Froggatt*, 2 Wms. Saund. 367 a; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Van Rensselaer v. Bradley*, 3 Denio, 135.

(*j*) *Vernon v. Smith*, 5 B. & Ald. 1, 11; *Roe d. Bamford v. Hayley*, 12 East, 464, 469; *Simpson v. Clayton*, 4 Bing. N. C. 758.

(*k*) *Roe d. Bamford v. Hayley*, *supra*.

(*l*) *Iggulden v. May*, 2 B. & P. N. R. 449. See S. C. 9 Ves. 325.

(*m*) *Paul v. Nurse*, 8 B. & C. 486. See *Doe d. Cheere v. Smith*, 5 Taunt. 795; as to conditions not to assign without license, and the effect upon such conditions of giving a license to assign, see *Dumpor's case*, 4 Co. 119; 1 Smith's L. C. (5th ed.) 28; 22 & 23 Vict. c. 35, s. 1.

[assignee of the benefit of such agreement could not enforce specific performance of it against the lessor. (*n*)

A covenant in a lease to cultivate the land demised in a particular manner will run with the land; (*o*) so, a covenant not to carry on a particular trade upon the premises; (*p*) so, a covenant not to build on a certain spot. (*q*) A covenant to reside on the demised premises runs with the land, and binds the assignees of the lessee. (*r*) A covenant in a lease to keep the premises insured against fire, where the sum insured is to be laid out in rebuilding or repairing the premises, is a covenant that runs with the land. (*s*)

A covenant by the lessee of a mill, for himself and his assigns, not to hire persons to work in the mill who were settled in other parishes, was held not to run with the land so as to bind the assignee of the lessee. (*t*) The lessee of a public-house covenanted with the lessors to take all his beer of them or their successors in their trade of brewers; the lessors afterwards assigned their premises and trade, and the assignees removed the plant and carried on the trade of brewers elsewhere; the court held, without determining whether such a covenant was generally capable of running with the land, that as the assignees had ceased to carry on the trade of the lessors, to which only the covenant applied, they had no claim for a breach of the covenant. (*u*)

The owner of a mill and of certain land granted a lease of the land, upon the terms of the lessee yielding and paying rent, and also doing suit to the mill of the lessor by grinding all the corn there that should grow upon the demised land; it was held that the doing suit to the mill was in the nature of a rent reserved, and

(*n*) *Weatherall v. Geering*, 12 Ves. 504. See *Buckland v. Papillon*, L. R. 1 Eq. 477; 35 L. J. C. 387; 1 Weekly Notes, 377.

(*o*) *Cockson v. Cock*, Cro. Jac. 125.

(*p*) *Mayor of Congleton v. Pattison*, 10 East, 130, 138; *Barron v. Richard*, 3 Edw. Ch. 96. So a covenant not to let or establish any other mill site on the same stream to be used for a particular purpose. *Norman v. Wells*, 17 Wend. 136.

(*q*) See *Weston v. M'Dermott*, L. R. 1 Eq. 499; 35 L. J. C. 190. So a covenant not to erect a building on a common or public square owned by the grantor or covenantor, in front of the premises con-

veyed. *Watertown v. Cowen*, 4 Paige, 510; *Mann v. Stephens*, 10 Jur. 560; *Atkins v. Chilson*, 7 Met. 398; *Barrow v. Richards*, 8 Paige, 351; *Stuyvesant v. New York*, 11 Paige, 414; *Perkins v. Coddington*, 4 Rob. (N. Y.) 647.

(*r*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*s*) *Vernon v. Smith*, 5 B. & Ald. 1; *Thomas v. Von Kapff*, 6 Gill & J. 372; *Harris v. Coulbourn*, 3 Harring. 338.

(*t*) *Mayor of Congleton v. Pattison*, 10 East, 130; and see *Walsh v. Fussell*, 6 Bing. 163, 169.

(*u*) *Doe v. Reid*, 10 B. & C. 849. See *Hartley v. Pehall, Peake*, 178.

[incident to the reversion at common law, and that the implied covenant to render it ran with the land and the reversion so long as the ownership of the mill and the land belonged to the same person, and, consequently, the assignee of the reversion in both could sue upon it. (v) A grant or demise for a term of years of a license to dig for and carry away china clay in certain land, contained a covenant by the grantee to pay compensation to the grantor for all such parts of the land as he might injure by digging; the covenant was held to run with the land and with the reversion, so that the assignee of the grantor was entitled to maintain an action for a breach. (x) And in a similar case, the assignee of the grantee was held liable under such covenant. (y)

A covenant by a lessor to supply the premises demised, being a house, with water, was held to be a covenant running with the land, upon which the assignee of the lessee might sue the reversioner. (z) A covenant with the owner of land to supply pure water for the cattle on the land runs with the land, so as to give a right of action for a breach to the devisee of the land. (a)

The benefit of a covenant, capable of running with an estate in land, may be annexed to an estate in fee; and in a lease the benefit or burden of such a covenant may be annexed to the term and to the reversion. (b) The owner of an estate in fee granted it to another, with a covenant for further assurance; the assignee of the grantee was held entitled to the benefit of the covenant and to maintain an action upon it against the grantor. (c) The defendant, possessed of premises for a term of years, assigned them to another for the residue of the term, leaving no reversion, and covenanted for quiet enjoyment, and the assignee assigned them to the plaintiff; it was held that the covenant ran with the term, and that the plaintiff, as assignee of the term, was entitled to sue upon it. (d) If a tenant from year to year demises for a term of years, he does not thereby as-

To what estates covenants may be annexed.

(v) *Vyviau v. Arthur*, 1 B. & C. 410.
See *Richardson v. Capes*, 2 B. & C. 841.

(x) *Martyn v. Williams*, 1 H. & N. 817;
26 L. J. Ex. 117.

(y) *Norval v. Pascoe*, 34 L. J. C. 82.

(z) *Jourdain v. Wilson*, 4 B. & Ald.
266.

(a) *Sharp v. Waterhouse*, 7 E. & B.
816; 27 L. J. Q. B. 70.

(b) See *ante*, 1383; *Middlemore v. Goodale*, Cro. Car. 503; *Noke v. Awder*, Cro. Eliz. 373; *Campbell v. Lewis*, 3 B. & Ald. 392.

(c) *Middlemore v. Goodale*, Cro. Car. 503.

(d) *Campbell v. Lewis*, 3 B. & Ald. 392.

[sign the whole of his interest, which is for an indefinite period, determinable by notice to quit, and may last longer than the term, and during the continuance of his tenancy, there is a reversion to which the covenants in the lease are annexed and which will pass to an assignee. (*e*)

A covenant contained in a lease of tithes, to take the tithes in kind, was held to run with the lease of the tithes and bind the assignee; (*f*) and a covenant in a lease of the tolls of a market will run with the tolls demised by the lease. (*g*) So, a covenant may be annexed to the grant of a license to make a channel for supplying water to a mill; (*h*) and to the grant of a license to dig for minerals. (*i*) But a covenant cannot be annexed to a rent issuing out of land. The owner of lands in fee conveyed them to the use that he, his heirs, and assigns might have a certain rent issuing out of the premises, and subject thereto, to the use of the defendant, his heirs, and assigns, and the defendant covenanted with him, his heirs, and assigns, to pay the said rent, and to build certain messuages on the premises for better securing the said rent, and the owner of the rent afterwards demised the rent to the plaintiff for a term of years; it was held that the covenant did not run with the rent, and that the plaintiff was not entitled to sue upon it. (*j*)

A covenant cannot be annexed to a merely equitable estate, as that of a mortgagor; so, where a mortgagor leased, and it appeared on the face of the deed that he had only the equity of redemption in the land, it was held that the covenants were not annexed to his interest, and his assignee could not maintain an action upon them. (*k*)

A reversion by estoppel will carry with it the covenants in a lease, and the assignee of such reversion may sue upon the covenants. (*l*) The execution of an indenture of

(*e*) *Oxley v. James*, 13 M. & W. 209; and *Cutley v. Arnold*, 1 J. & H. 651; 28 L. J. C. 352.

(*f*) *Bally v. Wells*, 3 Wils. 25.

(*g*) *Earl of Egremont v. Keene*, 2 Jones Ex. Ir. 307.

(*h*) *Earl of Portmore v. Bunn*, 1 B. & C. 694.

(*i*) *Muskett v. Hill*, 5 Bing. N. C. 694, 708; *Martyn v. Williams*, 1 H. & N. 817; 26 L. J. Ex. 117; *Norval v. Pascoe*, 34 L. J. C. 82.

(*j*) *Milnes v. Branch*, 5 M. & S. 411. See *Randall v. Rigby*, 4 M. & W. 130, 135; *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J. Q. B. 374.

(*k*) *Pargeter v. Harris*, 7 Q. B. 708. See 2 Sugden V. & P. (8th Am. ed.) 577, note (*a*); *White v. Whitney*, 3 Met. 81; *Tufts v. Adams*, 8 Pick. 547; *Kellogg v. Wood*, 4 Paige, 578.

(*l*) *Gouldsworth v. Knights*, 11 M. & W. 337; *Sturgeon v. Wingfield*, 15 M. & W. 224; *Doe d. Prior v. Ongley*, 10 C. B.

[lease creates a reversion by estoppel in the lessor as against the lessee, according to the terms of the indenture. If the lessor's title is recited in the deed, the lessee, executing the deed, is estopped from denying such recital; if the lessor's title does not appear in the deed, the lessee is estopped from alleging that the lessor had no estate in the premises, *nil habuit in tenementis*, and the reversion thus arising by estoppel in the lessor is *primâ facie* a reversion in fee-simple, which, as against the lessee, will pass to an assignee, or devisee, or by descent to an heir. (n) The lessee may rebut the *primâ facie* presumption of the reversion being in fee-simple by evidence consistent with the estoppel, as that the reversion is an estate for life or for years, but not by evidence that the lessor had no estate at all, because such evidence would be inconsistent with the estoppel. (o) If it appears in the deed that the lessor had no reversion at all, as in lease by a mortgagor which recites the previous mortgage, the parties are estopped from setting up any reversion to which the covenants could be annexed. (p)

A covenant cannot be annexed to goods, so as to be assignable with the property in the goods. So, it was resolved, if a man leases sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the term to deliver the like cattle or goods, and the lessee assigns the goods over, this covenant shall not bind the assignee. (q) So, a covenant in a charter-party to pay freight is not annexed to the property in the ship, so as to pass to the assignees of the ship, in the same manner as covenants are said to run with land. (r) So, in a lease of certain premises together with movable articles for the purpose of carrying on a trade, with a covenant by the lessor that if the articles of the same kind left by the lessee at the end of the lease should exceed a certain value, the lessor should pay the excess, it was held that the covenant did not run with the reversion, because it related to chattels, and consequently that the executor of the lessor, who was also devisee of the reversion in the premises under the will of

25; *Cuthbertson v. Irving*, 4 H. & N. 742;

6 Ib. 135; 28 L. J. Ex. 306; 29 Ib. 485.

(n) *Cuthbertson v. Irving*, 4 H. & N.

742; 6 Ib. 135; 29 L. J. Ex. 485.

(o) *Weld v. Baxter*, 1 H. & N. 568; 25

L. J. Ex. 214; 26 Ib. 112.

(p) *Pargeter v. Harris*, 7 Q. B. 708.

(q) *Spencer's case*, 5 Coke, 16, 3d Reso-
lution.

(r) *Splidt v. Bowles*, 10 East, 279.

Reversion
by estoppel.

Covenants
cannot be
annexed to
goods.

[the lessor, was liable on the covenant only as executor *de bonis testatoris*, and not *de bonis propriis*, as assignee of the reversion. (*s*)

The grantee, or devisee, or heir of the reversioner, or, if the reversion is a term of years, the executor, are assignees within the statute 32 Hen. 8, c. 34, and take the benefit and the burden of the covenants which are annexed to the reversion. (*t*) So, the executor or administrator of a lessee may be charged as assignee; (*u*) the assignees in bankruptcy of the lessee, after an election by them to take the lease, are entitled to the benefit and liable to the burden of the covenants as assignees of the term. (*v*)

The assignee must take the same estate to which the covenants are annexed. (*x*) An underlessee is not liable, as an assignee, upon the covenants in the original lease, because he does not take the estate of the lessee to which the covenants are annexed. (*y*) An assignee of the whole term is liable, though he takes it by way of mortgage only, and subject to a proviso for reassignment on payment of the mortgage debt. (*z*) A lessee for lives granted all his estate and interest in the premises to an underlessee for ninety years, if the lives should so long live; it was held that this was not an assignment of the whole estate of the lessee for lives, because such estate, being freehold, was greater in the estimation of law than the estate for years granted by him, and therefore the underlessee was not liable, as assignee, upon the covenants in the original lease. (*a*) Land was conveyed to such uses as the grantee should appoint, and in default of such appointment to the use of the grantee in fee, subject to certain covenants executed by him which were of a nature to run with the land; the grantee having exercised the power of appointment, it was held that the appointee took the estate discharged from the covenants, because he did not take the estate of the grantee, but took under the ap-

(*s*) *Gorton v. Gregory*, 3 B. & S. 90; 31 L. J. Q. B. 302.

(*t*) *Derisley v. Custance*, 4 T. R. 75.

(*u*) See *Spencer's case*, 1 Smith L. C. (5th ed.) 43, 47; *Tremere v. Morison*, 1 Bing. N. C. 89; *Wollaston v. Hakewill*, 3 M. & G. 297.

(*v*) *Goodwin v. Noble*, 8 E. & B. 587; 27 L. J. Q. B. 204.

(*x*) *Roach v. Wadham*, 6 East, 289; 2 Sugden V. & P. (8th Am. ed.) 594.

(*y*) *Holford v. Hatch*, Doug. 183.

(*z*) *Williams v. Bosanquet*, 1 B. & B. 238, overruling *Eaton v. Jaques*, Doug. 455.

(*a*) *Earl of Derby v. Taylor*, 1 East, 502.

[pointment, which defeated the subsequent uses to which the covenants were annexed. (b) A person possessed of a term leased for a less term and assigned his reversion, and the assignee took a conveyance in fee by which the reversion became merged; it was held that, the estate to which the covenants were annexed being destroyed by the merger, the covenants were extinguished at common law; (c) but the incidents to and obligations on a reversion expectant on a lease are now preserved in case of a merger of the reversion by the statute 8 & 9 Vict. c. 106, s. 9.

Where a lease is made by a tenant for life under a power of leasing, containing covenants made with the lessor, and the tenant for life dies pending the lease, the remainder-man is an assignee within the statute 32 Hen. 8, c. 34, Or lease made under power. and takes the benefit and the burden of the covenants annexed to the reversion. (d) If the lease made in such case is not in accordance with the power, and therefore void as against those in remainder, though it may be good by way of estoppel as between the parties to it, the remainder-man cannot maintain an action upon the covenants. (e) And upon the death of the lessor such lease becomes absolutely void, so that an assignee of it under a subsequent assignment takes no interest, and can maintain no action upon the covenants against the executor of the lessor; (f) but the lessee, or his assignee under an assignment previous to the death of the lessor, may charge the executor upon the express covenants in the lease; (g) though he could not upon the covenants merely implied in law, because such covenants are limited to the continuance of the lessor's interest. (h)

The mortgagee of a lease is liable as assignee upon the covenants in the lease which are annexed to the term. (i) The mortgagee of an estate, upon default of the mortgagor, On mortgages. is entitled to the remedies upon a lease made by the mortgagor before the mortgage, as assignee of the reversion; if a lease is made by the mortgagor alone after the mortgage, the mortgagee may

(b) *Roach v. Wadham*, 6 East, 289.

(e) *Yellowly v. Gower*, 11 Ex. 293; 24

(c) *Webb v. Russell*, 3 T. R. 393; and *L. J. Ex.* 289.

see *Burton v. Barclay*, 7 Bing. 745.

(f) *Andrew v. Pearce*, 1 B. & P. N. R.

(d) *Isherwood v. Oldknow*, 3 M. & S. 158.

382; and see *Rogers v. Humphreys*, 4 A.

(g) *Williams v. Burrell*, 1 C. B. 402.

& E. 299; *Whitlock's case*, 8 Co. 71 a;

(h) *Adams v. Gibney*, 6 Bing. 656; *Pen-*

Sacheverell v. Froggatt, 2 Wms. Saund.

fold v. Abbott, 32 L. J. Q. B. 67.

368; *Bringloe v. Goodson*, 4 Bing. N. C.

(i) *Williams v. Bosanquet*, 1 B. & B.

726.

238; *ante*, 1394.

[treat the lessee as a trespasser, but he is not entitled to the remedies upon the lease. (*j*) A mortgagor and mortgagee joined in leasing the mortgaged premises, and the covenants by the lessee were made with the mortgagor only; it was held that they were not annexed to the estate of the mortgagee, and that the assignee of the mortgagee was not entitled to sue upon them. (*k*)

The assignee of a particular estate in the reversion in the whole premises demised, as a grantee of the reversion for life, or for a term of years, is an assignee within the statute 32 Hen. 8, c. 34, and is entitled to the benefit of the covenants and conditions in the lease. (*l*) The assignee of the reversion in a specific part of the demised premises is an assignee within the statute, and is entitled to the benefit of the covenants apportioned to his interest in the premises; but he cannot take advantage of the conditions in the lease, as if a lease be of three acres reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, because it is entire. (*m*) So, the assignee of the reversion in a specific part of the demised premises may maintain an action against the lessee on a covenant to repair for not repairing that part. (*n*) A covenant to repair in a joint demise by tenants in common runs with the entire reversion only; so that the heir of one of the tenants in common deceased cannot sue alone for a breach of such covenant without joining the other tenant in common; (*o*) and upon the decease of all the tenants in common, the representatives of all must join in an action on the covenant. (*p*) If the reversion in an undivided share of the demised premises is assigned to the lessee, whereby his term, as to that share, becomes merged in his reversion in the same, the reversioners in the other shares of the premises, or their assignees, are entitled to sue the lessee upon the covenants, and to recover damages in proportion to the extent of their interest. (*q*)

(*j*) *Rogers v. Humphreys*, 4 A. & E. 299; and see *Alchorne v. Gomme*, 2 Bing. 54; *Keech v. Hall*, Doug. 21; *Thunder v. Belcher*, 3 East, 449. (*n*) *Twynam v. Pickard*, 2 B. & Ald. 105.

(*k*) *Webb v. Russell*, 3 T. R. 393; and see *ante*, 1386. (*o*) *Foley v. Addenbrooke*, 4 Q. B. 197.

(*l*) Co. Lit. 215 a; *Wright v. Burroughes*, 3 C. B. 685. (*p*) *Thompson v. Hakewill*, 19 C. B. N. S. 713; 35 L. J. C. P. 18.

(*m*) Co. Lit. 215 a; and see *Wright v. Burroughes*, 3 C. B. 685; *Twynam v. B. 377*. Where a covenant running with

[The assignee of the term in part of the demised premises is entitled to the benefit of the covenants, and liable to the burden of them, so far as they extend to his part of the premises; thus, the assignee of the term in part of the premises, under an underlease of that part for the whole term, is entitled to sue the lessor on a covenant for not finding materials for the repairs of that part. (*r*) So, an action of covenant will lie against the assignee of part for not repairing his part; (*s*) and an action of covenant will lie against an assignee of part for an apportionment of the rent. (*t*) In a mining lease granted by deed to three persons in joint tenancy, they covenanted jointly and severally to compensate for all surface damage; two of the three joint tenants assigned their interest in the demise; it was held that the covenant ran with the land, and that the assignee was liable severally for the whole amount of compensation. (*u*) But an action of covenant cannot be maintained by the lessor against the assignee of a part of the term in the premises; as an underlessee for a term short of the original term by a day, or year, or other interval of time. (*v*)

On assignment of part of term.

An assignee of the lessee is liable upon the covenants running with the land, only so long as he remains assignee; and he does not continue liable, at law or in equity, after he has actually assigned away the term; though he may have assigned it to an insolvent person, and for the mere purpose

Assignee not liable after assignment.

the land is divisible in its nature, of the entire estate or interest in different parcels of the land, passes by assignment to separate persons, the covenant will attach upon each parcel *pro tanto*. *Astor v. Miller*, 2 Paige, 68; *Hills v. Miller*, 3 Paige, 254; 2 Sugden V. & P. (8th Am. ed.) 577, note (*a*); *Hare v. Cator*, Coop. 766; *Badeley v. Vigurs*, 4 Ell. & Bl. 71; *Twynham v. Pickard*, 2 B. & Ald. 105. See *Stevenson v. Lambard*, 2 East, 575; *Merceron v. Dowson*, 5 B. & C. 481; *Curtis v. Spitty*, 1 Bing. N. C. 756. The assignee of an undivided moiety of leasehold premises can sue in his own name upon a covenant of warranty contained in the original lease. *Van Horne v. Crain*, 1 Paige, 455. As to the respective rights of a mortgagee, and the purchaser of the equity of redemption in covenants contained in the deed under which the mort-

gagor held the premises, see per Shaw C. J. in *White v. Whitney*, 3 Met. 87, 88. So an assignee of a part of leased premises is liable to be charged for that part. *Wollaston v. Hakewill*, 3 M. & G. 297; *Merceron v. Dowson*, 5 B. & C. 479.

(*r*) *Palmer v. Edwards*, 1 Doug. 183, note.

(*s*) *Congham v. King*, Cro. Car. 222. *S. C. nom. Conan v. Kemise*, Sir W. Jones, 245; cited in *Stevenson v. Lambard*, 2 East, 575, 580; *Wollaston v. Hakewill*, 3 M. & G. 297.

(*t*) *Stevenson v. Lambard*, *supra*. See *Curtis v. Spitty*, 1 Bing. N. C. 756.

(*u*) *Norval v. Pascoe*, 34 L. J. C. 82.

(*v*) *Holford v. Hatch*, 1 Doug. 183. See *Williams v. Bosanquet*, 1 B. & B. 238, 261; *Earl of Derby v. Taylor*, 1 East 502; *ante*, 1394.

[of avoiding his liability. (*w*) But an action may be maintained against him after he has assigned away the premises for a breach committed while he was assignee. (*x*) He is not liable for breaches of covenant committed before the assignment to him. (*y*) An assignee is not liable after he has assigned away the term, although the lease contained a covenant not to assign without the consent of the lessor, and no consent had been given. (*z*) An assignee cannot maintain an action for a breach of covenant committed before the assignment to him. (*a*)

(*w*) *Lekeux v. Nash*, 2 Str. 1221; *Taylor v. Shum*, 1 B. & P. 21; *Onslow v. Corrie*, 2 Madd. 330; *Fagg v. Dobie*, 3 Y. & C. 96; *Odell v. Wake*, 3 Camp. 394.

(*x*) *Harley v. King*, 2 Cr., M. & R. 18.

(*y*) *St. Saviour's Southwark v. Smith*, 3 Burr. 1271; *Coward v. Gregory*, 36 L. J. C. P. 1.

(*z*) *Paul v. Nurse*, 8 B. & C. 486.

(*a*) *Lewes v. Ridge*, Cro. Eliz. 863, cited in *Canham v. Rust*, 8 Taunt. 227, 231; *Johnson v. St. Peter's Hereford*, 4 Ad. & El. 520. The right of an assignee to sue on covenants running with the land, is confined to breaches, which are committed subsequent to the assignment, and during the continuance of his estate as assignee. Com. Dig. Covenant (B. 3); Bac. Abr. Covenant (E. 5); *Lucy v. Levington*, 2 Lev. 26; *Johnson v. Hereford*, 4 Ad. & El. 520; *Lewes v. Ridge*, Cro. Eliz. 863; *Clark v. Swift*, 3 Met. 392. See *Tillotson v. Boyd*, 4 Sandf. (S. C.) 516. The case of a continuing breach is an exception; as a breach of covenant to repair. *Mascal's case*, Moore, 242; S. C. 1 Leon. 62; *Vivian v. Champion*, 1 Salk. 141; *Sprague v. Baker*, 17 Mass. 586. See *Shep. Touch.* 170. So it has been held that though there may have been a formal breach of a covenant running with the land, during the lifetime of the ancestor, yet the heir may sue, if the substantial damages have accrued since the death of the ancestor. Per Lord Abinger C. B. *Raymond v. Fitch*, 2 Cr., M. & R. 598, 599, and cases there cited; Bac. Abr. Heir and Ancestor (*c*); *Kingdon v. Nottle*, 4 M. & Sel. 53. But see *Mitchell v.*

Warner, 5 Conn. 497; *Clark v. Swift*, 3 Met. 390, 393; 4 Kent, 472; 2 Sugden V. & P. (8th Am. ed.) 577, note (*g*). The assignee of the lessor is entitled to rents accruing, but not payable at the time of the assignment, and may sue for them when due. There is, in these cases, no apportionment. But rents, which have accrued, and are payable, but not actually paid, do not pass to the assignee or grantee. *Winslow v. Rand*, 29 Maine, 362, 365; *Demarest v. Willard*, 8 Cowen, 106. Thus, upon the covenants of seisin and good right to convey, and against incumbrances, no action can be maintained in the name of an assignee or subsequent purchaser; for, if broken at all, they are broken at the time of the execution of the deed. *Clark v. Swift*, 3 Met. 390, 393; *Bickford v. Page*, 2 Mass. 455; *Osborne v. Atkins*, 6 Gray, 424; *Whitney v. Dinsmore*, Cush. 128; *Thayer v. Clemence*, 22 Pick. 493, 494; 2 Sugden V. & P. (8th Am. ed.) 577, note (*g*); *Greenley v. Wilcox*, 2 John. 1; *Heath v. Whidden*, 24 Maine, 383; *Kane v. Sanger*, 14 John. 89; *Chapman v. Holmes*, 5 Halst. 20; *Mitchell v. Warner*, 5 Conn. 497; *Gilbert v. Bulkley*, 5 Conn. 262; *Ross v. Turner*, 2 English, 232; *Cathcart v. Bowman*, 5 Barr, 317; *Fowler v. Poling*, 2 Barb. 300; *Anderson v. Knox*, 20 Ala. 156. In Ohio it is held that if the grantor is in actual possession at the time of the conveyance the covenant of seisin runs with the land. *Backus v. McCoy*, 3 Ohio, 218; *Devore v. Sunderland*, 17 Ohio, 52. See *Kingdon v. Nottle*, 1 M. & Sel. 355; S. C. 4 Ib. 53. But see *Parker v. Brown*, 15 N. H. 176.

[The personal liability of the original lessee on his covenants in the lease is not got rid of by assignment, but he may be sued notwithstanding he has assigned the demised premises; and upon his death the liability upon his express covenants will devolve upon his executor. (b) His liabilities arising from privity of estate with the reversioner are put an end to by assignment, and the acceptance by the reversioner of the assignee as tenant. (c)

Liability of lessee after assignment.

The lessor, after an assignment of the reversion, cannot sue for a subsequent breach of a covenant which passes with the reversion to the assignee. (d) Under a tenancy, not created by deed, upon the terms that the tenant should keep the premises in repair during the tenancy, the landlord may maintain an action for a breach of the contract in not keeping the premises in repair, notwithstanding he has assigned his reversion, because the contract, not being by a lease under seal, does not pass with the reversion; (e) and where the lease is by deed the lessor remains entitled to the covenants which do not run with the reversion, notwithstanding an assignment. (f)

Right of lessor after assignment.

Neither can an assignee of the grantee sue upon the covenants of warranty in the deed, unless the grantor was seized of the estate at the time of the conveyance; because, as the estate did not, the covenants could not pass. *Slater v. Rawson*, 1 Met. 450; *Pike v. Galvin*, 29 Maine, 186; *Randolph v. Kinney*, 3 Rand. 394; 2 Sugden V. & P. (8th Am. ed.) 577, note (g). But if the deed conveys the possession, that is enough to carry along with it this covenant, and the right to sue upon it. *Slater v. Rawson*, 6 Met. 439; *Fowler v. Poling*, 6 Barb. 165; *Beddoe v. Wadsworth*, 21 Wend. 120.

(b) *Thursby v. Plant*, 1 Wms. Saund. 240 a; *Auriol v. Mills*, 4 T. R. 94, 98; *Randall v. Rigby*, 4 M. & W. 130, 133.

(c) *Ib.*; *Wadham v. Marlow*, 8 East, 314, note; 1 H. Bl. 437; and see *Walker's case*, 3 Co. 21; 1 Wms. Saund. 240, 241 c; 2 Ib. 302, note (5).

(d) *Green v. James*, 6 M. & W. 656; and see *Spencer's case*, 1 Smith's L. C. 5th ed. 43, 58.

(e) *Pickford v. Parson*, 5 C. B. 920; and see *ante*, 1385.

(f) *Stokes v. Russell*, 3 T. R. 678. A stipulation in a deed poll, that the grantee, his heirs, and assigns, shall erect and perpetually maintain a fence between the granted premises and land adjoining, is not a covenant running with the land or otherwise. It is a personal agreement of the grantee, made as part of the consideration of the grant, and evidenced by his acceptance of the deed, which may bind him and his legal representatives, but does not affect the estate. *Parish v. Whitney*, 3 Gray, 516. See *Plymouth v. Carver*, 16 Pick. 183; *Maule v. Weaver*, 7 Barr, 329; *Kimpton v. Eve*, 2 Ves. & Bea. 353; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; *Kellogg v. Robinson*, 6 Vt. 276; per *Maule J.* in *Pickford v. Parson*, 5 C. B. 920, 932. *Standen v. Christmas*, 10 Ad. & El. 135; *Lock v. Wight*, Strange, 571; *Burnett v. Lynch*, 5 B. & C. 589; *Phelps v. Townsend*, 8 Pick. 392; *Huff v. Nickerson*, 27 Maine, 106. The matter of stipulations respecting fences was discussed by *Ells-*

[SECTION V.]

Parties under Assignment of Contracts by Marriage.

Marriage operates as an assignment in law to the husband, to a qualified extent, of the rights and liabilities of the wife, arising out of contracts made before the marriage. (a)

Marriage is an absolute gift in law by the wife to the husband of all chattels personal in possession in her own right; but if they be in action, as debts by obligation, contract, or otherwise, the husband does not acquire them absolutely, unless he and his wife recover them, or, as it is called, reduce them into possession. (b) The husband must join the wife as a party in an action upon the contracts of the wife made before marriage, and cannot sue alone in his own name. (c) In the case of negotiable instruments held by the wife at the time of the marriage, the husband acquires the right to transfer or indorse them; but he may sue upon them in his own name without joining the wife, and, if transferable by indorsement, without an indorsement to himself. (d)

worth J. in *Wright v. Wright*, 21 Conn. 341-393; *Parish v. Whitney*, 3 Gray, 516; 2 Sugden V. & P. (8th Am. ed.) 577, note (a). Covenants running with the land will ordinarily pass to the grantee as assignee by a conveyance of it, even by a deed of release and quitclaim, without warranty. *Brown v. Staples*, 28 Maine, 497; *De Chaumont v. Forsythe*, 2 Penn. 507; *Markland v. Crump*, 1 Dev. & Bat. 94; *Fowler v. Poling*, 6 Barb. 165, 166; *Beddoe v. Wadsworth*, 21 Wend. 120; *Slater v. Rawson*, 1 Met. 450. They pass by a sheriff's deed. *M'Craday v. Brisbane*, 1 Nott & McC. 104; *White v. Whitney*, 3 Met. 85-87; *Lewis v. Cook*, 13 Ired. 193. So, by an administrator's deed. *Hodges v. Saunders*, 17 Pick. 470; *White v. Whitney*, *ubi supra*; *Redwine v. Brown*, 10 Geo. 311. "This is founded upon the very plain and intelligible principle, that they are beneficial to the grantee, but useless to the grantor." Per Shaw C. J. in *Hodges v. Saunders*, 17 Pick. 475; *Buckhurst's case*, 1 Co. 1. A grant by

the mortgagor of his equity of redemption, with covenants of warranty, &c., has been held to be so far a conveyance of the land as to carry the covenants with it to the grantee and his assigns. *White v. Whitney*, 3 Met. 81; *Tufts v. Adams*, 8 Pick. 547; *Kellogg v. Wood*, 4 Paige, 578.

(a) 2 Bl. Com. 433; 1 Roper's Husband & Wife, 2d ed. 204. Contracts made with a wife after marriage depend upon the capacity of a married woman as a party to a contract. See "Contracts with Married Women," *ante*, 223.

(b) Co. Litt. 351 b; 2 Blackstone Com. 434.

(c) *Milner v. Milnes*, 3 T. R. 627, 631; and see *Bendix v. Wakeman*, 12 M. & W. 97; *ante*, 223.

(d) *M'Neillage v. Holloway*, 1 B. & Ald. 218; and see *ante*, 228; the observation of Lord Ellenborough, in *M'Neillage v. Holloway*, that the negotiable instruments of the wife vest absolutely in the husband upon the marriage, as chattels personal in possession, has been pronounced to be in-

[The wife may sue alone upon contracts made with her before marriage, subject to the action being met by a plea in abatement on the ground of the husband not being joined as co-plaintiff; but no other objection can be taken by the defendant on the ground of her being married. (*e*)

If the husband is himself debtor to the wife before marriage, the marriage, in general, operates as a release in law of the debt; (*f*) but a contract between an intended husband and wife, by which he binds himself for the payment of money to her after his death, is not released by the marriage; the wife surviving may maintain an action upon it against the representatives of the deceased husband. (*g*)

The husband becomes liable upon marriage for all the debts and liabilities of the wife contracted before marriage. The husband may be sued jointly with the wife upon such ^{as to wife's liabilities.} debts and liabilities; (*h*) but he cannot be sued alone upon them. If the husband is sued alone, the objection is matter of substance; if it appears upon the record, it is a good ground of demurrer, or motion in arrest of judgment, or error; if it transpires upon the evidence, it is a ground of nonsuit or adverse verdict. (*i*) The non-joinder of the wife cannot be amended by adding the wife as a defendant under the common law procedure act, 1852, s. 222. (*j*)

The wife may be sued alone upon the liabilities contracted by her before marriage, subject to a plea in abatement of the non-joinder of her husband as a co-defendant; but she cannot take any other objection on the ground of her coverture. (*k*) The wife may be taken in execution upon a judgment against her, whether her husband is taken with her or not; but the court will, in general, discharge her, unless she has separate property with which she can satisfy the judgment. (*l*)

correct. See *Gaters v. Madeley*, 6 M. & W. 423, 427; *Hart v. Stephens*, 6 Q. B. 937, 943.

(*e*) *Milner v. Milnes*, 3 T. R. 627; *Morgan v. Painter*, 6 T. R. 265. See *ante*, 223; the husband might bring a writ of error upon the judgment. *Milner v. Milnes*, *supra*.

(*f*) Co. Litt. 264 b.

(*g*) *Milbourn v. Ewart*, 5 T. R. 381; and see *Smith v. Stafford*, Hob. 216; *Cage v. Acton*, 1 Ld. Raym. 515.

(*h*) *France v. White*, 1 M. & G. 731; *Helps v. Clayton*, 17 C. B. N. S. 553; 34 L. J. C. P. 1.

(*i*) *Mitchinson v. Hewson*, 7 T. R. 348; *Richardson v. Hall*, 1 B. & B. 50.

(*j*) *Garrard v. Giubilei*, 11 C. B. N. S. 616; 13 Ib. 832; 31 L. J. C. P. 131, 270.

(*k*) *Milner v. Milner*, 3 T. R. 627, 631; *Lovell v. Walker*, 9 M. & W. 299. See *ante*, 223.

(*l*) *Edwards v. Martyn*, 17 Q. B. 693; *Ivens v. Butler*, 7 E. & B. 159; 26 L. J.

[Upon the death of the husband, leaving the wife surviving, the rights upon the contracts of the wife before marriage, which have not been reduced into possession by the husband in his lifetime, survive to the wife ; (*m*) so also with contracts made in favor of the wife after marriage ; (*n*) and with contracts made in favor of the husband and wife jointly. (*o*) Thus, a promissory note made to a wife during coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime ; (*p*) and the executors of the husband cannot sue upon such note. (*q*) A married woman, having lent money to her husband which she held as an administratrix, took as security the joint and several promissory note of her husband and two other persons ; it was held that, though no action could have been brought upon the note during the coverture, yet after the death of the husband the note survived to the wife, and she might sue the other makers. (*r*) A bond given to husband and wife, on the husband's dying first, survives to the wife. (*s*) A judgment recovered by husband and wife jointly vests in the survivor upon the death of either. (*t*)

The liability of the husband upon the contracts of the wife before marriage continues only during the coverture, so that upon the death of the husband in the lifetime of the wife the liability survives against the wife solely, and upon the death of the wife in the lifetime of the husband the liability devolves upon her administrator ; unless the creditor has obtained judgment against the husband in the lifetime of the wife. A court of equity will not relieve a surviving husband against such judgment by reason of his not having received any property with his wife ; nor, on the other hand, will a court of equity assist a creditor against a surviving husband, who has become discharged from his wife's liabilities by her death, by reason of his having acquired her property by the marriage. (*u*)

- Q. B. 145. See *Ferguson v. Clayworth*, 6 Q. B. 269 ; *Newton v. Boodle*, 9 Q. B. 948 ; *Larkin v. Marshall*, 4 Ex. 804. (*m*) *Gaters v. Madeley*, 6 M. & W. 423. (*n*) *Richards v. Richards*, 2 B. & Ad. 447, 452 ; per Parke B. *Bendix v. Wake-man*, 12 M. & W. 97, 99. (*o*) *Coppin v. ———*, 2 P. Wms. 496. (*p*) *Gaters v. Madeley*, 6 M. & W. 423 ; *Scarpellini v. Atcheson*, 7 Q. B. 864. (*q*) *Howard v. Oakes*, 3 Ex. 136. (*r*) *Richards v. Richards*, 2 B. & Ad. 447. (*s*) *Coppin v. ———*, 2 P. Wms. 496. (*t*) *Bond v. Simmonds*, 3 Atk. 21 ; *Coppin v. ———*, 2 P. Wms. 496. (*u*) *Heard v. Stamford*, 3 P. Wms. 409 ;

[Upon the death of the wife in the lifetime of the husband, the rights arising out of contracts made with her before or during coverture, if not previously reduced into possession by the husband, pass to the administrator of the wife. Death of wife. (v) Thus, upon a bond given to the wife during coverture, after the death of the wife, the husband can no longer sue in his own right, but can become entitled to sue only by obtaining administration to the wife. (w) So, a promissory note made to the wife before marriage, upon the death of the wife in the lifetime of the husband, and before he has reduced it into possession, passes to the wife's administrator, who is the proper party to sue upon it. (x) But contracts made with husband and wife jointly survive to the husband in his own right upon the death of the wife. (y)

Upon the death of the wife in the lifetime of the husband the liabilities contracted by her before marriage survive against her representatives, and her husband can be charged only as her administrator; unless the creditor has obtained judgment against him in the lifetime of the wife. (z)

The reduction into possession by the husband, so as to exclude absolutely the interest of the wife, consists in some act which gives the husband the possession of the *chose in action*, or what is equivalent thereto; as, in the case of a debt, the payment of the money to the husband or to his agent. (a) Money paid to the wife is regarded in law as in the possession of the husband, though it is the proceeds of property held by trustees for her separate use; so that where the wife received such money and lent it to the defendant, it was held to have been reduced into possession, and that the husband must sue for it in his own name only during the coverture, and was entitled to sue in his own right after the wife's death. (b) A promissory note had been given to the wife before marriage, and the husband had received the interest on the note

Reduction into possession by husband.

Reduction into possession by husband.

Cases *temp.* Talb. 173; Woodman v. Chapman, 1 Camp. 189; and see Mitchinson v. Hewson, 7 T. R. 348.

(v) Betts v. Kimpton, 2 B. & Ad. 273.

(w) Day v. Padrone, 2 M. & S. 396, note (b).

(x) Hart v. Stephens, 6 Q. B. 937.

(y) Coppin v. ———, 2 P. Wms. 496.

(z) See *ante*, 1402.

(a) See 1 Roper, *Husb. & Wife*, 2d ed. 208, 222; and see Purdew v. Jackson, 1 Russ. 1; Scarpellini v. Atcheson, 7 Q. B. 864, 875.

(b) Bird v. Peagram, 13 C. B. 639; 22 L. J. C. P. 166. See Sloper v. Cottrell, 6 E. & B. 497; 26 L. J. Q. B. 7.

[during the life of the wife ; it was held that he had not thereby reduced the note into possession, but upon the wife's death it passed to her administrator. (c)]

If an action is brought in the names of husband and wife upon a contract of the wife before marriage, and the husband dies before judgment, the right of action survives to the wife who may, by entering a suggestion of her husband's death upon the record, prosecute the suit to judgment for her own sole use ; and even if the husband dies after judgment, but before execution, the benefit of the judgment will survive to the wife ; (d) and the wife surviving is not bound by the undertakings of the husband in the action. (e) If the wife dies in the lifetime of the husband pending such action, the suit abates, and the benefit of the contract devolves upon the wife's administrator. (f) If the husband in his lifetime brings an action in his own name upon a contract in respect of which he might have joined his wife, it is said to amount to an election to take it himself and exclude the interest of the wife, so that upon his death it would not survive to her. (g)

In equity, where the husband assigns a *chose in action* of his wife for valuable consideration, and dies before either he or the assignee has actually obtained possession of it, leaving the wife surviving, — whether the *chose in action* was reversionary, so that it could not have been reduced into possession, or whether it was not reduced into possession through neglect, — in either case the wife surviving will be entitled as against the assignee for valuable consideration. (h)

Upon the bankruptcy of the husband the debts and *choses in action* to which he is entitled in right of his wife become Bankruptcy of husband. vested in the assignees, who have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt. (i) The assignees are not entitled to sue in their own names only for the recovery of

(c) Hart v. Stephens, 6 Q. B. 937.

426 ; Garforth v. Bradley, 2 Ves. sen. 675,

(d) Gaters v. Madeley, 6 M. & W. 423,

676.

427 ; Sherrington v. Yates, 12 M. & W. 855, 865 ; Anon. 3 Atk. 726.

(e) Lee v. Armstrong, 9 M. & W. 14.

(h) Ellison v. Elwin, 13 Simon, 309 ; Ashby v. Ashby, 1 Coll. 553 ; Purdew v. Jackson, 1 Russ. 1 ; Honner v. Morton, 3 Russ. 65 ; Hutchings v. Smith, 9 Sim. 137 ; Story Eq. Jur. § 1412.

(f) Checchi v. Powell, 6 B. & C. 253.

(g) Gaters v. Madeley, 6 M. & W. 423,

(i) See *post*, 1414.

[debts, for which the husband could not have sued without joining the wife, as on a promissory note made to the wife before her marriage ; (*j*) they must sue in their own names jointly with that of the wife for the recovery of debts in respect of which it would have been necessary for the husband to join the wife. (*k*) Upon the death of the bankrupt husband, before a *chose in action* of the wife is reduced into possession, the right of survivorship of the wife prevails over the right of the assignee. (*l*)

The bankruptcy of the husband during the marriage discharges the debts of the wife for which the husband has become liable by reason of the marriage, both as against the husband and the wife. (*m*)

Upon a divorce the wife becomes solely entitled, "as if at the date of the divorce, her husband had died, and restored her to the position of a *femè sole*," to all the rights arising out of contracts which have accrued in her right before or during the coverture and which have not been reduced into possession by the husband during the coverture. (*n*)

Divorce.

SECTION VI.

Of Parties under Assignment of Contracts by Death.

An executor or administrator becomes entitled, in general, to all the debts and rights of contract to which the deceased was entitled at the time of his death. (*a*) As a contract is not assignable at law, the executor or administrator is alone entitled to maintain an action at law upon a contract of the deceased, although the deceased may have assigned the benefit of it in his lifetime ; the assignee is not entitled to sue in his own name. (*b*) So, the executor is alone entitled at law to

Right of executor upon contracts of deceased.

(*j*) Sherrington *v.* Yates, 12 M. & W. 855.

(*k*) Richbell *v.* Alexander, 10 C. B. N. S. 324 ; 30 L. J. C. P. 268.

(*l*) Mitford *v.* Mitford, 9 Ves. 87 ; Hornsby *v.* Lee, 2 Madd. 16 ; Sherrington *v.* Yates, 12 M. & W. 855, 865.

(*m*) Miles *v.* Williams, 1 P. Wms. 249 ; Lockwood *v.* Salter, 5 B. & Ad. 303.

(*n*) Wells *v.* Malbon, 31 Beav. 48 ; 31 L. J. C. 344 ; as to the effect of judicial separation and of an order of protection of property under the divorce and matrimonial causes act, see *ante*, 252.

(*a*) 1 Wms. Ex. 5th ed. 709 ; 1 Wms. Saund. 216 a, note (1).

(*b*) See Brandt *v.* Heatig, 2 Moore, 184.

[maintain an action upon the contract, although the benefit of it may have been bequeathed by the will of the deceased, and although the executor may be bound, in the distribution of assets, to transfer the benefit to the legatee. (*e*)

If there be more than one executor, they jointly represent the testator and take the legal interest in his estate; therefore they must sue jointly on the contracts made with him; (*d*) but if some of the executors are omitted as plaintiffs, the defendant can object only by a plea in abatement (*e*) And if some of the executors enter into a new contract, though in the course of administration of the estate, they may alone sue upon it without joining the other executors. (*f*)

An executor or administrator is liable, in general, to the extent of the assets which come to his hands to be administered, upon all the contracts of the deceased remaining undischarged at his death. (*g*) Accordingly, the executor or administrator is liable, so far as he has assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contract, as for rent or on bonds, covenants or the like under seal; or debts on simple contracts, as notes unsealed, and promises not in writing either expressed or implied. (*h*)

If there be several executors, all who have proved the will must be joined as defendants; if some only are sued, they may plead in abatement the nonjoinder of other executors who have proved; but it is not necessary to join those executors who have not proved. (*i*)

A person may also charge his real assets in the hands of his heir or devisee by a contract under seal in which he binds himself *and his heirs*, or covenants for himself *and his heirs*, with an express designation of his *heirs* in the con-

Liability of
heir and
devisee.

(*c*) *Canham v. Rust*, 8 Taunt. 227.

(*d*) *Wms. Ex.* 5th ed. 818, 1692; *Fox-wist v. Tremaine*, 2 *Wms. Saund.* 212; a plea that one of the plaintiffs, executors, had renounced, was held bad; *Creswick v. Woodhead*, 4 *M. & G.* 811; but renunciation may now be effected under 20 & 21 *Vict. c. 77*, s. 79. See *In the Goods of Whitham*, 1 *W. N.* 408.

(*e*) *Wms. Ex.* 5th ed. 1693.

(*f*) *Brassington v. Ault*, 2 *Bing.* 177; and see *Heath v. Chilton*, 12 *M. & W.* 632.

(*g*) 1 *Wms. Saund.* 216 a, note (1); 2 *Wms. Ex.* 5th ed. 1557.

(*h*) *Ib.*

(*i*) 1 *Wms. Saund.* 291 m; 2 *Wms. Ex.* 5th ed. 1750; *Ryalls v. Bramall*, 1 *Ex.* 734.

[tract. Under such contract the heir was liable by the common law to the extent of the lands or real assets descended to him from the covenantor or obligor; but there was no remedy upon such contracts against a devisee of the lands. (*j*)

The law was altered in this respect by the statute 3 Will. & Mary, c. 14, for which the statute 1 Will. 4, c. 47 has been substituted. By s. 2 of that act it is enacted to the effect that all wills and testamentary dispositions of any lands, tenements, or hereditaments shall be deemed, as against such person with whom the person making any such will or testamentary dispositions shall have entered into any bond, covenant, or other specialty binding his heirs, to be void. And by s. 3, for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, that every such creditor shall have his action upon the said bonds, covenants, and specialties against the heir of such obligor, or covenantor, and such devisee, or the devisee of such devisee jointly. And by s. 4, that in case there shall not be any heir at law against whom jointly with the devisee a remedy is thereby given, the creditor shall have his action against such devisee solely. (*k*)

Liability of
heir and
devisee.

By the common law the heir when sued upon an obligation of the ancestor, might plead *riens per descent*, that is to say, that he had not any lands by descent from the ancestor at the time of suing out the writ, and though he had aliened the lands descended before the suing out of the writ, he was entitled to the verdict on that issue, unless it could be proved that he had aliened them for the purpose of defrauding the plaintiff of his debt. (*l*) But by the statute 3 Will. & Mary, c. 14, s. 5 (reënacted by 1 Will. 4, c. 47, s. 6), the heir at law in such case was made answerable for the debts and covenants, to the value of the land so aliened by him. And by s. 6 of the same statute (reënacted by 1 Will. 4, c. 47, s. 7), it is provided to the effect that to the plea by the heir of *riens per descent* the plaintiff may reply that he had lands, tenements, or hereditaments, from his ancestor *before* the writ brought, and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and

(*j*) See *Hunting v. Sheldrake*, 9 M. & W. 256, 263.

(*l*) See 2 Wms. Saund. 8, (n.); *Brown v. Shuker*, 1 C. & J. 583.

(*k*) As to this statute see 2 Wms. Saund. 8 d; Chitty's Statutes, tit. Wills.

[execution shall be awarded to the value of the lands as if the debt were his own. By the same statute, 3 Will. & Mary, c. 14, s. 7 (reënacted by 1 Will. 4, c. 47, s. 8), it is enacted to the effect that devisees shall be made liable and chargeable in the same manner as the heir at law, notwithstanding the lands devised shall be aliened before the action brought. (*m*)

Contracts under seal which do not expressly bind the heir, remain, as at common law, without any remedy by action against the heir or devisee, and under the above statutes contracts binding the heir were not made a charge upon the land itself; (*n*) but by the statute 3 & 4 Will. 4, c. 104, all the real estate of a deceased person has been made assets, to be administered in courts of equity for the payment of his debts as well due on simple contract as on specialty, provided that in the administration of assets by courts of equity under that act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

The benefit of covenants annexed to real estate, or, as it is called, running with the land, as covenants for title, to repair and the like, are assigned in law with the land to the heir or devisee of the deceased owner, if the estate be freehold, and to the executor, only if the estate is a chattel interest in the land. (*o*) And if such covenants are broken in the lifetime of the deceased, so that he has acquired a right of action upon them, but no damage has accrued to his personal estate, the right of action runs in like manner with the land. (*p*) Accordingly, where an executor brought an action upon covenants for title contained in a conveyance of land to the testator, charging breaches in the testator's lifetime, but not showing any damage to the personal estate, it was held that he could not recover; (*q*) and the devisee of the same land having brought an action for the same breaches of the same covenants, it was held that he was entitled to maintain

(*m*) See, further, as to the liabilities of heirs and devisees and the proceedings against them, 2 Wms. Saund. 7, 8; Bullen & Leake, Prec. Pl. 2d ed. 145, 509.

(*n*) Richardson v. Horton, 7 Beav. 112.

(*o*) See *ante*, 1394.

(*p*) Kingdon v. Nottle,¹ 1 M. & Sel. 355. But see 2 Sugden V. & P. (8th Am. ed.) 577, note (*g*); Clark v. Swift, 3 Met. 390, 393; Mitchell v. Warner, 5 Conn. 497.

(*q*) Kingdon v. Nottle, *supra*.

[the action, and to recover in respect of the deterioration in the value of the land by reason of the defective title. (*r*) So, upon a covenant contained in a deed of conveyance of land to make further assurance upon request, the heir of the covenantee may bring an action for a breach of covenant in refusing to make such assurance upon a request made by the ancestor in his lifetime, whereby after the death of the ancestor the heir was ejected. (*s*) But it is said that the executor may sue for a breach of covenant running with the land, committed in the lifetime of the covenantee, in respect of any damage caused thereby to the personal estate. (*t*)

Covenants
annexed to
real estate.

Where the covenant, though concerning the realty, does not run with the land, so that the heir or devisee cannot sue upon it, the executor is the only party entitled to bring the action; as, upon a covenant in a lease not to cut trees (the trees being excepted from the demise, and the covenant, therefore, being collateral and not running with the land), the executor was held entitled to sue for a breach committed in the lifetime of the covenantee; (*u*) and upon a covenant to repair contained in a lease made by a tenant for life, and therefore expiring with his estate, the executor was held entitled to sue; (*v*) nor is any special damage to the personal estate essential to the right of action in such cases. (*x*) So also, where the testator had been evicted in his lifetime in consequence of a defect in the title, so that there were no heirs or assigns of the land, it was held that the damages belonged to the executor who was entitled to sue upon the covenants for title. (*y*)

The burden of a covenant running with the land cannot be annexed in law to an estate in the land, except in the case of covenants made between lessor and lessee; in which case the burden of such covenants may be made assignable with the term and with the reversion; upon the death of the termor the burden of such covenants passes with the term to the executor or legatee, and upon the death of the reversioner it passes with the reversion to

(*r*) *Kingdon v. Nottle*, 4 M. & Sel. 53.

(*s*) *King v. Jones*, 5 Taunt. 418; *Jones v. King*, 4 M. & S. 188. But see 2 Sugden V. & P. (8th Am. ed.) 577, note (*g*), and cases cited.

(*t*) *Kingdon v. Nottle*, 1 M. & Sel. 355, 364; 4 Ib. 53, 57; *Knights v. Quarles*, 2

B. & B. 102, 105; and see Wms. Ex. 6th ed. 757.

(*u*) *Raymond v. Fitch*, 2 C., M. & R. 588; *ante*, 1387, 1388.

(*v*) *Ricketts v. Weaver*, 12 M. & W. 718.

(*x*) *Ib.*

(*y*) *Lucy v. Levington*, 2 Lev. 26; 1 Ventr. 175.

[his heir or devisee, or, if the reversion is a chattel interest, to his executor or legatee. (z)]

Upon a contract of sale of land the executor, and not the heir, of the deceased purchaser becomes entitled in law to a right of action vested in the deceased for a breach by the vendor in not completing the purchase, and may recover the loss of interest on the deposit-money, and the expenses of investigating the title. (a) And the executor, and not the heir, is entitled to a right of action vested in the deceased against an attorney for breach of duty in investigating the title of land conveyed to the deceased. (b) It is said, "that if a man covenant by deed to another and his heirs to enfeoff him and his heirs of the manor of D., and will not do it, and he to whom the covenant is made die, his heir shall have a writ of covenant upon that deed" (c); but this doctrine seems inconsistent with the principles of law above stated.

In equity a contract for the sale of land is treated as if it was specifically executed from the date of the contract, so that, upon the death of the purchaser before completion, the equitable title to the land passes to his heir or devisee, who may insist upon specific performance against the vendor, and require the purchase-money to be paid out of the personal estate of the deceased; and upon the death of the vendor before completion, the right to the purchase-money passes to his executor or administrator, who may insist upon specific performance against the purchaser, and require the heir of the vendor to convey the land. (d)

The executor or administrator of a deceased person becomes entitled to the right of action upon all bills, notes, and negotiable securities, of which the deceased was the holder at the time of his death; (e) and the executor or administrator is entitled to indorse and negotiate such securities; but he would become personally liable upon such indorsement. (f)

(z) See *ante*, 1382, 1394.

(a) *Orme v. Broughton*, 10 Bing. 533.

(b) *Knights v. Quarles*, 2 B. & B. 102.

(c) *Fitz. N. B.* 145, C., cited and followed in *Jones v. King*, 4 M. & Sel. 188, 191.

(d) *Story Eq. Jur.* § 790; notes to

Fletcher v. Ashburner, 1 White & Tudor, L. C. 3d ed. 754. See *Cooper v. Jarman*, L. R. 3 Eq. 98; 36 L. J. C. 85.

(e) *Timmis v. Platt*, 2 M. & W. 720.

(f) *Robinson v. Stone*, 2 Strange, 1260. See per Buller J. *King v. Thom*, 1

[Where the deceased holder of a promissory note payable to order had signed his name on the note for the purpose of indorsement, but had not delivered it, and his executor delivered it to the proposed indorsee, but did not indorse his name, it was held that there was no complete indorsement, and the person to whom it was so delivered acquired no right to sue upon it. (*g*) The holder of a bill or note, by delivery of it for valuable consideration without indorsement, may create an equitable title, which either he or his executor may be compelled to complete. (*h*)

Upon the death of one of several persons jointly entitled under a contract, the legal right to sue for a breach of the contract remains in the survivors only, whether the breach occurred before or after the death of the joint party; the executor or administrator of the deceased person cannot sue either alone, or jointly with the survivors; upon the death of the last survivor, in whom solely the right became vested, his executor or administrator becomes entitled. (*i*) If the deceased person was severally entitled under a contract, though others were also severally entitled with him, his executor becomes entitled and may sue. (*j*)

Joint contracts.

Upon the death of one of several persons jointly liable upon a contract, the liability devolves upon the surviving parties, and the representative of the deceased cannot be sued at law jointly with the survivors; the entire liability ultimately devolves upon the last survivor of the persons jointly liable, and after his death it is transferred to his executor or administrator in the same manner as the liability upon a contract made by him alone. (*k*)

Contracts which depend upon the existence, or the personal qualities, skill, or services of one of the parties are, in general, discharged by the death of that party; (*l*) as a contract of marriage. (*m*) The contract of an ap-

Contracts discharged by death of party.

T. R. 487, 489; *Childs v. Monins*, 2 B. & A. 460.

(*g*) *Bromage v. Lloyd*, 1 Ex. 32.

(*h*) *Watkins v. Maule*, 2 Jac. & Wal. 237; and see *Whistler v. Forster*, 14 C. B. N. S. 248; 32 L. J. C. P. 161; cited *ante*, 1370.

(*i*) Wms. Ex. 5th ed. 1689.

(*j*) Wms. Ex. 5th ed. 1691. See *Withers v. Bircham*, 3 B. & C. 254.

(*k*) See *ante*, 1356.

(*l*) 2 Wms. Ex. 5th ed. 560; per *Parke B. Siboni v. Kirkman*, 1 M. & W. 418, 423; *Wentworth v. Cock*, 10 A. & E. 42; *Beckham v. Drake*, 8 M. & W. 846, 854.

(*m*) See *Chamberlain v. Williamson*, 2 M. & S. 408.

[prentice with his master to learn his art and serve him, without any mention of executors, was held to be discharged by the death of the master, because the apprentice is bound from a personal knowledge of the integrity and ability of the master. (*n*) A contract to build a light-house was held to be discharged by the death of the contractor, as being a matter of personal skill and science. (*o*)

Contracts of agency, giving authority to one of the parties to act for the other, are, in general, discharged by the death of the principal. (*p*) The plaintiff was employed by the owner of a picture to sell it, upon the terms that if he succeeded he should be paid 100*l.*; the owner of the picture died, and after his death the plaintiff succeeded in selling the picture and claimed the 100*l.* upon the original contract from the defendant as administrator of his employer; it was held that he had no claim against the administrator, because the contract was revoked by the death, though he might recover for the value of his services rendered to and accepted by the defendant. (*q*) A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term. (*r*)

A person contracted to erect a certain building and died before it was begun; it was held that his executors, having completed the contract, might recover the price in their representative character as executors. (*s*) A tailor received an order from the defendant for a coat, and died before it was completed; it was held that his administratrix, having finished the coat and delivered it to the defendant, who accepted it, might sue for the price in her representative character. (*t*)

Where a person had contracted for the delivery to him of a certain quantity of goods monthly until a certain date, and for any further quantity monthly he might require, and died before the contract was completed, his administrator was held liable for not accepting the monthly deliveries of the goods in pursuance of the

(*n*) *Bakter v. Burfield*, 2 Strange, 1266.

(*o*) Cited per Patteson J. *Wentworth v.* 30 L. J. Ex. 207.

Cock, 10 A. & E. 42, 45.

(*p*) See *ante*, 278.

(*q*) *Campanari v. Woodburn*, 15 C. B.

400; 24 L. J. C. P. 13.

(*r*) *Tasker v. Shepherd*, 6 H. & N. 575;

30 L. J. Ex. 207.

(*s*) *Marshall v. Broadhurst*, 1 C. & J. 403.

(*t*) *Werner v. Humphreys*, 2 M. & G. 853.

[contract after his death. (*u*) So, where a person guarantied the running balance of an account for goods supplied to another, until he gave notice to the contrary, it was held that the contract was not determined by his death, and that his executor was liable on the guaranty for goods supplied after his death, but before any notice given of revoking the guaranty. (*v*)

Contracts discharged by death of party.

A person may validly contract that his executor shall pay a sum of money after his death, and such contract is binding upon his executor, (*w*) and it is a contingent liability during his lifetime, which may be proved against his estate in case of bankruptcy. (*x*)

A right of action for a breach of contract in respect of damage which is strictly personal, is discharged by the death of the party entitled thereto; as, a right of action for a breach of promise of marriage, where there is no special damage to the estate; (*y*) so, a right of action for a breach of the contract of a medical man to use due care and skill, in respect of negligence or unskilfulness affecting the life or health of his employer; and a right of action for imprisonment caused by the negligence of an attorney. (*z*)

SECTION VII.

Of Parties under Assignment by Bankruptcy.

The rights of contract of a bankrupt, in general, become vested in the assignees under the bankrupt law consolidation act, 12 & 13 Vict. c. 160, s. 141 (following 6 Geo. 6, c. 16, s. 63; and 1 & 2 Will. 4, c. 56, s. 25), which assigns to them all the personal estate of the bankrupt. It enacts "that when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate (or order of discharge, which has been substituted for the certificate by the

Rights of contract vest in assignees.

(*u*) *Wentworth v. Cock*, 10 A. & E. 42.

(*y*) *Chamberlain v. Williamson*, 2 M. &

(*v*) *Bradbury v. Morgan*, 1 H. & C.

Sel. 408.

249; 31 L. J. Ex. 462.

(*z*) *Chamberlain v. Williamson*, 2 M. &

(*w*) *Powell v. Graham*, 7 Taunt. 580.

Sel. 415. See *post*, 1414, 1415.

(*x*) *Ex parte Tindal*, 8 Bing. 402.

[bankruptcy act, 1861, 24 & 25 Vict. c. 134, s. 157), and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt by virtue of their appointment; and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had, if he had not been adjudged a bankrupt." "As the object of this law is to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely, so as to pass, not only what in strictness may be called the property and debts of the bankrupt, but also those rights of action to which he was entitled for the purpose of recovering, in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld, or taken from him." (a)

A right of action for unliquidated damages for a breach of contract will pass by bankruptcy to the assignees. (b) A builder having contracted to execute certain building work, contracted with the defendant for the supply of stone for that purpose, who made default in delivering the stone according to his contract, whereby the builder was unable to complete the work; it was held that, upon the subsequent bankruptcy of the builder, the right of action for the breach of contract by the defendant in not delivering the stone passed to the assignees, who might recover all the damages to which the bankrupt was entitled. (c) So, a right of action for the wrongful dismissal of the bankrupt, in breach of a contract to employ him in a certain business for a term of years, was held to pass to the assignees of the bankrupt. (d) A right of action by a printer against the defendant for not delivering a printing-machine under a contract to that

Rights of action of bankrupt.

(a) *Rogers v. Spence*, 13 M. & W. 571, 580.

(c) *Wright v. Fairfield*, *supra*.

(d) *Beckham v. Drake*, 8 M. & W. 846;

(b) *Wright v. Fairfield*, 2 B. & Ad. 727. 11 Ib. 315; 2 H. L. C. 579.

[effect, whereby his trade was stopped, was held to pass to his assignees, who became entitled to recover the damages sustained in the loss of business. (*e*) Where the bankrupt, an under-tenant, had been distrained upon by the superior landlord for rent due from the original lessee, it was held that the right of action against the latter, in respect of the distress of the bankrupt's goods, passed to the assignees. (*f*) A right of action to recover a sum of money which the bankrupt had been induced to pay by means of a false representation, was held to pass to his assignees. (*g*)

Rights of action for wrongs personal to the bankrupt, for which he would be entitled to a remedy whether his property were diminished or impaired or not, are not within the enactment, even in cases where injuries of this kind have been accompanied or followed by loss of property: to this class the action of trespass to the land, and that of trespass to the person or goods of the bankrupt belong; also the action for a breach of promise of marriage; and the action against a medical man for negligence in his professional treatment. In such actions the primary and essential cause of action, being the personal injury to the bankrupt, still remains in him, and does not pass to the assignees. (*h*) A right of action against an attorney for negligence in defending an action, whereby his client suffered judgment and was taken in execution, was held not to pass to the assignees of the client upon his bankruptcy, because it was a personal wrong, for which he would be entitled to a remedy, irrespectively of any pecuniary loss sustained; but the right of action against the attorney under the same circumstances for the pecuniary loss occasioned by the execution against the property of the client, was held to pass to the assignees, because such pecuniary loss was the substantial and primary cause of action. (*i*)

The assignees of a bankrupt are entitled, in general, to the benefit of the contracts of the bankrupt which are executory at the time of the bankruptcy; they have the right of adopting or repudiating such contracts, according as they may think them likely to prove beneficial or the contrary.

Executory
contracts of
bankrupt.

(*e*) *Stanton v. Collier*, 3 E. & B. 274; 315, 319; *Beckham v. Drake*, 8 M. & W. 846, 854; 2 H. L. C. 579, 597, 634; 23 L. J. Q. B. 116.

(*f*) *Hancock v. Caffyn*, 8 Bing. 358.

(*g*) *Hodgson v. Sidney*, L. R. 1 Ex. 313; 35 L. J. Ex. 182.

(*h*) *Drake v. Beckham*, 11 M. & W.

Brewer v. Dew, 11 M. & W. 625; *Rogers v. Spence*, 13 M. & W. 571; 12 Cl. & Fin. 700; *Wetherell v. Julius*, 10 C. B. 267.

(*i*) *Wetherell v. Julius*, 10 C. B. 267.

[“In order to enforce these contracts it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or contemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contracts, than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either side, nor imposing new ones, nor anticipating the period of performance on either side. (*j*) If the assignees do all that the bankrupt ought to have done, they may recover against the contractor the damages which the bankrupt himself could have recovered if he had performed his contract; if they omit to do so, they lose the benefit of the contract, and the other contracting party has his remedy against the bankrupt’s estate.” (*k*)

The assignees are not required to give express notice of their intention to adopt the contract. All that they are bound to do is to perform the bankrupt’s part of the contract, as and when he should have done it himself. But they may by an express waiver of the contract discharge the other party from all obligation towards them. (*l*) In a case where the assignees took no steps to enforce a contract of the bankrupt for a long time after the bankruptcy, it was held that there was evidence from which a jury might infer that they had abandoned the contract. (*m*)

Where goods have been sold to a person who becomes bankrupt before delivery, and the vendor retains a lien on the goods for the price, the right to the goods under the contract of sale passes to the assignees of the bankrupt; but they cannot claim possession of the goods without paying the price. (*n*) The bankrupt, before his bankruptcy, contracted to buy goods of the defendant to be shipped on board a vessel to be chartered by him and sent to Odessa for that purpose, and, having chartered and sent the vessel according to the contract, afterwards became bankrupt; it was held that the defendant was not justified in refusing to deliver the goods by reason of the bankruptcy, and that the assignees, being ready and willing to pay for the goods, were entitled to sue the defendant for not delivering them. (*o*)

(*j*) Per Rolfe B. *Gibson v. Carruthers*, 8 M. & W. 321, 326.

(*k*) Per Parke B. *Gibson v. Carruthers*, 8 M. & W. 321, 333; *Boorman v. Nash*, 9 B. & C. 145.

(*l*) *Gibson v. Carruthers*, 8 M. & W. 321, 329, 334.

(*m*) *Lawrence v. Knowles*, 5 Bing. N. C. 399.

(*n*) *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951; *Miles v. Gorton*, 2 C. & M. 504.

(*o*) *Gibson v. Carruthers*, 8 M. & W. 321.

[A policy of insurance effected by a person upon his own life, upon his bankruptcy, passes to his assignees ; and where the bankrupt, after his bankruptcy, had assigned such a policy to a third person, who paid the premiums and upon the death of the bankrupt received the sum insured, it was held that the assignees might recover the amount, deducting the premiums, as money received to their use. (p) Assignees in bankruptcy are not assignees within the meaning of a condition in a life policy, to the effect that it should be void in case of death caused by suicide, except in the hands of *bonâ fide* assignees ; so that on the death of the bankrupt by suicide they are not entitled to be paid the amount insured by such policy. (q)

Executory contracts in which the personal labor, skill, or conduct of the bankrupt forms a material part of the consideration do not, in general, pass to the assignees. (r) “ The contract of partnership is a familiar instance ; and in every case where the motive or consideration of the solvent party was founded, wholly or in part, upon his confidence in the skill or personal ability of the bankrupt, if the bankrupt from his circumstances, is unable to perform his part, the assignees are not entitled to substitute their own capacity, or skill, or credit, for that of the bankrupt.” (s) If an order is given to build a house, and the builder, after beginning to build it, becomes bankrupt, and the house is afterwards completed by the assignees, they may recover under the order. (t) But it seems doubtful how far the assignees would acquire the right of completing a contract of that kind made with the bankrupt. (u)

Contracts involving personal skill.

The bankruptcy transfers to the assignees only those contracts to which the bankrupt is beneficially entitled, not those to which he is entitled only as trustee ; hence, if the bankrupt before bankruptcy has assigned the beneficial interest in a contract to which he was entitled, after bankruptcy the right of action upon the contract remains vested in him as trustee.

Contracts of bankrupt as trustee.

(p) *Schondler v. Wace*, 1 Camp. 487.

(s) Per Lord Abinger C. B. *Gibson v.*

(q) *Jackson v. Forster*, 1 E. & E. 463 ;

Carruthers, 8 M. & W. 321, 343.

28 L. J. Q. B. 166 ; 29 Ib. 8.

(t) *Whitmore v. Gilmour*, 12 M. & W.

(r) See *Gibson v. Carruthers*, 8 M. &

808, 810.

W. 321, 333, 343 ; *Beckham v. Drake*, 8 M. & W. 846 ; 11 Ib. 315 ; 2 H. L. C.

(u) See *Knight v. Burgess*, 33 L. J. C.

727.

[tee for the benefit of the assignee of the contract, and an action upon the contract must be brought in the name of the bankrupt, and not of his assignees in bankruptcy. (*v*) If the bankrupt has assigned a debt only as security for a debt due from him to the assignee, and at the time of the bankruptcy the debt secured is less than the debt assigned, leaving a balance of the latter beneficially vested in the bankrupt, the right of action vests in the assignees in bankruptcy; in such case they would sue as trustees of the assignee of the debt in respect of the amount for which it had been assigned as security, and they would sue in their own right in respect of the balance as forming part of the bankrupt's estate. (*w*)

Upon a policy of insurance on a cargo of goods two claims arose: one for an average loss, and the other for a return of part of the premiums in a certain event which happened; the insured, having previously assigned the goods, together with the benefit of the policy so far as concerned the goods, afterwards became bankrupt; it was held that the right of action in respect of the average loss remained in the bankrupt, as trustee for the assignee of the goods, while the right of action for the return of premiums in which the bankrupt was beneficially interested passed to his assignees. (*x*)

By the bankrupt law consolidation act, 1849, s. 125 (following previous enactments), it is enacted, "that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." Rights arising out of contracts, as debts, bonds, and policies of insurance, are within this section; therefore, where the bankrupt has assigned them before bankruptcy, it is necessary, in order to complete the title of the assignee as against the assignees in bankruptcy, that notice of the assignment should be given to the debtor before the bankruptcy, because, until such notice is given, the debtor would be justified in paying to the bankrupt, or to his order, and so the debt would remain in the order and

(*v*) *Winch v. Keeley*, 1 T. R. 619; *Car- 796, 809; and see Parnham v. Hurst*, 8
penter v. Marnell, 3 B. & P. 40; and see M. & W. 743.

Dangerfield v. Thomas, 9 A. & E. 292; (*x*) *Castelli v. Boddington*, 1 E. & B.
D'Arnay v. Chesneau, 13 M. & W. 796. 66, 879; 22 L. J. Q. B. 5; 23 Ib. 31.

(*w*) *D'Arnay v. Chesneau*, 13 M. & W.

[disposition of the bankrupt within the above enactment; after notice of the assignment to the debtor, the debt is no longer in the order and disposition of the assignor, and his assignees in bankruptcy acquire no claim. (*y*)

Upon contracts made with the bankrupt after bankruptcy, but before certificate or order of discharge, the assignees may, in general, interpose and claim the benefit; as, upon a promissory note made in favor of an uncertificated bankrupt. (*z*) So, if an uncertificated bankrupt continues to carry on his business for profit, the assignees are entitled to claim the proceeds. (*a*) Where an order for work was given to the bankrupt after an act of bankruptcy, and was completed by him as agent for the assignees at their cost and with their materials, it was held that the assignees were entitled to sue, as assignees, for the price of the work and materials. (*b*)

Contracts
made after
bankruptcy.

But with regard to such contracts, as with regard to all property acquired after bankruptcy and before discharge, the bankrupt retains the right, unless the assignees interpose to claim it; he may sue on such contracts in his own name, and it is no defence to such action that the plaintiff is a bankrupt, unless the assignees have interfered and required the defendant to pay to them. (*c*) So, in the case of a second adjudication of bankruptcy against an uncertificated bankrupt, it was held that all the rights of the bankrupt acquired since his first bankruptcy, which the assignees under that bankruptcy had not interfered to claim, were transferred to the assignees under the second bankruptcy. (*d*)

(*y*) *Crowfoot v. Gurney*, 9 Bing. 372; *Elliot v. Clayton*, 16 Q. B. 581. See *Wilkinson v. Heyworth*, 9 Ad. & El. 375; *Williams v. Chambers*, 10 Q. B. 337.

2 Story Eq. Jur. § 1057; *Dearle v. Hall*, (b) *Whitmore v. Gilmour*, 12 M. & W. 808.

3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 808. (c) *Kitchen v. Bartsch*, 7 East, 53; *Silk v. Osborn*, 1 Esp. 140; *Chippendale v. Tomlinson*, 4 Doug. 318; *Cooke's Bank*. L. 431; *Herbert v. Sayer*, 5 Q. B. 965; and see *Fyson v. Chambers*, 9 M. & W. 460.

30; *Ryall v. Rowles*, 1 Ves. sen. 348; (d) *Morgan v. Knight*, 15 C. B. N. S. 669; 33 L. J. C. P. 168.

Dean v. James, 1 Ad. & El. 809 (a); *Belcher v. Campbell*, 8 Q. B. 1; *Edwards v. Martin*, L. R. 1 Eq. 121; and see *Edwards v. Scott*, 1 M. & G. 962; *Gibson v. Overbury*, 7 M. & W. 555.

(z) *Kitchen v. Bartsch*, 7 East, 53. See *Drayton v. Dale*, 2 B. & C. 293.

(a) *Crofton v. Poole*, 1 B. & Ad. 568;

[CHAPTER VIII.]

SPECIFIC PERFORMANCE.

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| <ol style="list-style-type: none"> 1. Matters relating to the jurisdiction generally. 2. By whom specific performance may be enforced. 3. Against whom it may be enforced. 4. As to the parties to the suit. 5. As to the bill. 6. As to how the plaintiff's case may be sustained in the absence of a written agreement — fraud — part performance — admission, by defendant, of parol agreement — parol variation of written agreement. <p>As to grounds of defence negating plaintiff's right to specific performance, except with a variation of the original agreement, viz. . fraud —</p> | <p>mistake — surprise — misrepresentation — unfulfilled promise — parol variation, &c.</p> <ol style="list-style-type: none"> 8. As to grounds of defence, negating <i>in toto</i> plaintiff's right to specific performance, viz. : personal incapacity — nature of contract, or fraud, &c., &c., attending its execution — matters relating to the estate, title, or consideration — plaintiff's conduct, &c., after contract — election of other remedy. 9. As to the proceedings in the suit, viz. : payment of purchase-money into court — reference of title and proceedings thereon — decree for plaintiff — conveyance — decree dismissing bill. |
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1. *Matters relating to the Jurisdiction generally.*

THE primary (and, until recently, the only) relief to be obtained in equity in England, for the non-performance of the contract, is a decree for specific performance. At one time there was a floating idea in the profession that the court might, under its general jurisdiction, award compensation for non-performance, in the event of the primary relief failing. Possibly, the power of granting such subsidiary relief may be inherent in the court, (a) but if so, the whole current of modern authorities is against its exercise ; (b) nor, in cases prior to the re-

(a) See *Nelson v. Bridges*, 2 Beav. 239 ; and 1 Sugden V. & P. 233.

(b) *Todd v. Gee*, 17 Ves. 273 ; *Swainsbury v. Jones*, 5 Myl. & Cr. 1, see p. 3 ; *Williams v. Higden*, 1 C. P. C. 500. In *Aberaman Ironworks v. Wickens*, L. R. 5 Eq. 515, Sir R. Malins V. C. said : " I certainly recollect the time at which there

was a floating idea in the profession, that this court might award compensation for the injury sustained by the non-performance of a contract in the event of the primary relief for a specific performance failing, and I have formerly seen bills praying such relief ; but that arises from my having known the profession sufficiently long

[cent act, did it make any difference that compensation was sought not against the owner of the estate, but against a person who

to recollect the time when the decision of Lord Kenyon, in *Denton v. Stewart*, 17 Ves. 276, note, [1 Cox Ch. 258], had] not been formally overruled. But at that time very little weight was attached to it, and very few instances occurred in which plaintiffs were advised to ask any such relief; and for a short time Sir W. Grant's decree, in *Greenaway v. Adams*, 12 Ves. 395, added something to the authority of *Denton v. Stewart*, although he threw out some doubts as to the principle of that case. This, however, lasted but a short time, for *Greenaway v. Adams*, occurring in 1806, Lord Eldon, in 1810, in *Todd v. Gee*, 17 Ves. 273, expressly overruled *Denton v. Stewart*, and from that time there has not, I believe, been any doubt upon the subject. Certainly, during the thirty years which have elapsed since that time, I have never supposed the granting any such relief as being within the jurisdiction of this court. Had it been supposed that this court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation in the event of the vendor proving not to have a good title." See *Tyler v. Webb*, 14 Beav. 14; *Thornton v. Court*, 17 Jur. 154. See the remarks of Shepley J. in *Woodman v. Freeman*, 25 Maine, 531, 544, 550, 551, upon *Denton v. Stewart*, and *Greenaway v. Adams*, above cited. The principle of these decisions [*Denton v. Stewart* and *Greenaway v. Adams*], was applied and acted upon by Chancellor Kent in *Phillips v. Thompson*, 1 John. Ch. 131, 150, 151. See *Warner v. Daniels*, 1 Wood. & M. 113, 114. But in *Hatch v. Cobb*, 4 John. Ch. 559, and in *Kempshall v. Stone*, 5 John. Ch. 193, the learned chancellor refused to act upon it, in consequence, apparently, of the doubt thrown over it by the suggestions of Lord Eldon in the above cited case of *Todd v. Gee*. In *Andrews v. Brown*, 3 Cush. 130, a bill was brought for the specific performance of a contract, or, in the alternative, for compensation to the plaintiff in damages. The question

raised was, whether, if the defendant had put it out of his power to perform his contract specifically, the court had the right to retain the bill, and to award compensation in damages. The decision affirmed the right. Wilde J. said: "Judge Story, in his commentaries, expresses the opinion that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance, or to some other relief; and that if it does attach in any other cases, it must be under special circumstances and peculiar equities; as, for instance, in cases of fraud, or where the party has disabled himself by matter *post facto* from a specific performance. 2 Story Eq. Jur. § 799. And we are of the same opinion, with this qualification, however, that if the learned commentator intended to express a doubt, whether a court of equity had jurisdiction to decree compensation in the cases last stated, we cannot concur in that doubt; for it is very certain that the case of *Denton v. Stewart* has never been overruled, and the decision in that case is in our opinion reasonable and conformable to the principles of equity." See, also, *Jervis v. Smith*, 1 Hoff. Ch. 470; *Doan v. Mauzey*, 33 Ill. 227; *Woodman v. Freeman*, 25 Maine, 531. See the remarks of Wells J. upon the case of *Denton v. Stewart*, in *Milkman v. Ordway*, 106 Mass. 255-257, which he concludes as follows: "Its doctrine is fully adopted in Massachusetts; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 Cush. 130; *Pingree v. Coffin*, 12 Gray, 288, 305; *Attorney General v. Deerfield River Bridge Proprietors*, 105 Mass. 1; and by other courts in this country; *Rees v. Smith*, 1 Ohio, 124; *Gibbs v. Champion*, 3 Ohio, 335; *Jones v. Shackelford*, 2 Bibb, 410; *Fisher v. Kay*, 2 Bibb, 434; *Slaughter v. Tindle*, 1 Litt. 358; *Rankin v. Maxwell*, 2 A. K. Marsh. 488; *Copper v. Wells*, Saxton, 10; *Berry v. Van Winkle*, 1 Green Ch. 269." A bill in equity cannot be sustained by a vendee for specific per-

[falsely assumed authority to sell; (c) nor, except under special circumstances, would a prayer in the alternative for the return of the deposit prevent the dismissal of the bill. (d)]

Now, under Lord Cairns's act, (e) whenever the court has jurisdiction to entertain a suit for specific performance, it may, in its discretion, award damages to the party injured, either in addition to, or substitution for, the primary relief; such damages to be assessed as the court shall direct. But this enactment, which has been held to be merely prospective, (f) has not enlarged the jurisdiction of the court, so as to enable a plaintiff to sue in equity, as at law, merely for damages for breach of contract. Except, therefore, in cases where before the act the court had jurisdiction to entertain a suit for specific performance, it will not award damages. (g) The test to be applied

As to damages under Lord Cairns's act. formance of a contract, or for compensation in damages by the vendor, for not making a conveyance when requested to do so, of a parcel of land which had no real existence, but which by mutual mistake of the parties the vendor had agreed to sell and convey, and the vendee had agreed to purchase and pay for. *Morss v. Elmen-dorf*, 11 Paige, 277. In *Ferson v. Sanger*, Davies's Rep. 252, 261, Mr. Justice Ware said: "Upon a review of all the cases, the rule practically established seems to be, that a court of equity will not take jurisdiction of a suit for damages when that is the sole object of the bill, and no other relief can be given. But when other relief is sought by the bill, which a court of equity is alone competent to grant, and damages are claimed as incidental to relief, which cannot be obtained at law, then the court, being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent multiplicity of suits, proceed to determine the whole cause." See, also, *Hill v. Fiske*, 38 Maine, 520; 2 Story Eq. Jur. §§ 796-799; *Scott v. Billgerry*, 40 Miss. 119; *Wiswall v. McGown*, 2 Barb. 270; *Bradley v. Bas-ley*, 1 Barb. Eq. 125; *Bullock v. Adams*, 5 C. E. Green, 367; *Welsh v. Bayaud*, 6 C. E. Green, 186; *Aday v. Echols*, 18 Ala. 353; *Sain v. Dulin*, 6 Jones Eq. 195; *Stone v. Bucknor*, 12 Sm. & M. 73. The

case of *Milkman v. Ordway*, 106 Mass. 232 (1870), stands upon the broad ground, as decided by a majority of the court, that, in a suit for specific performance of a contract, relief in damages will be decreed where a defect of title, right, or capacity of the defendant to fulfil the contract is developed by his answer, or at a subsequent stage of the proceedings; provided that the plaintiff, when he filed the bill, supposed and had reason to suppose himself entitled to a specific performance, and would be so entitled but for such disability. For cases in which it has been held that damages may be awarded instead of specific performance, see *Kay v. Johnson*, 2 H. & M. 118, 124; *Barlow v. Scott*, 24 N. Y. 40; *Pingree v. Coffin*, 12 Gray, 305; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 Cush. 130, 136; *Betts v. Neilson*, L. R. 3 Ch. Ap. 429, L. C.; 2 Dan. Ch. Pr. (4th Am. ed.) 1080, 1081, and in note; 1 Sugden V. & P. (8th Am. ed.) 233, notes (n) and (s).]

(c) *Stainsbury v. Jones*, 5 Myl. & Cr. 1.

(d) *Kendall v. Beckett*, 2 Russ. & M. 90, 91.

(e) 21 & 22 Vict. c. 27, sect. 2.

(f) *Wicks v. Hunt*, Johns. 380.

(g) *Rogers v. Challis*, 6 Jur. N. S. 334; 27 Beav. 175; *Chinnock v. Swainsbury*, 6 Jur. N. S. 1318; and see *Hindley v. Emery*, 1 Eq. 52; *Middleton v. Magnay*, 2 H. & M. 233, 236; *Lewers v. Earl of Shaftes-*

[in each case is whether, at the date of the filing of the bill, the plaintiff had or had not a good title to the primary equitable relief. (*h*) If he had, then it is immaterial that in the interval before the hearing of the suit, the contract has become incapable of specific performance; as, *e. g.* where a lease, or patent, (*i*) the subject-matter of the contract, has expired. If, on the other hand, the plaintiff, at the time of filing his bill, had no equity to have the contract enforced — as where its subject matter is such that the decree of the court would not operate upon it, — the act has no application. (*k*)

It is always matter of discretion with the court, whether it will award damages under the act, or leave the plaintiff to obtain them at law; (*l*) but there is a growing disinclination to remit a plaintiff to his legal remedies if adequate relief can be given in equity; and, in appropriate cases falling within the statute, damages will be awarded, even though not specifically asked for by the bill; (*m*) but not after a decree for specific performance has been made, unless a supplemental bill is filed for the purpose. (*n*) An inquiry, however, will not be directed where no special injury is alleged and proved; (*o*) or

The exercise of the jurisdiction purely discretionary.

bury, L. R. 2 Eq. 270; *Norris v. Jackson*, 1 J. & H. 319; *Howe v. Hunt*, 31 Beav. 420; *Johnson v. Wyatt*, 2 De G., J. & S. 18; *Laurence v. Austin*, 11 Jur. N. S. 576; *Durell v. Pritchard*, L. R. 1 Ch. Ap. 244; *Lehmann v. McArthur*, L. R. 3 Ch. Ap. 496; *Scott v. Rayment*, L. R. 7 Eq. 112; 2 Dan. Ch. Pr. (4th Am. ed.) 1082. Where the court is of opinion that the plaintiff should have proceeded at law, no assessment of damages will be directed in equity; but the bill will be dismissed, without prejudice to the plaintiff's right to proceed at law. *Clarkson v. Edge*, 10 Jur. N. S. 871; *Wycombe Railway Co. v. Donnington Hospital*, L. R. 1 Ch. Ap. 268, 275; *Avery v. Griffin*, L. R. 6 Eq. 606, 609. The plaintiff may by his misconduct forfeit his right to damages; *Collins v. Stuteley*, 7 W. R. 710; *Lancaster v. De Trafford*, 8 Jur. N. S. 873; and damages may be awarded though not specifically prayed for by the bill; *Wedmore v. Mayor of Bristol*, 11 W. R. 136; *Catton v. Wylde*, 32 Beav. 266; *Betts v. Neilson*, L.

R. 3 Ch. Ap. 429; *Pingree v. Coffin*, 12 Gray, 305; in addition to an account; *Betts v. Neilson*, L. R. 3 Ch. Ap. 429. But see *Yost v. Devault*, 9 Iowa, 60.

(*h*) See *Ferguson v. Wilson*, L. R. 2 Ch. Ap. 77, 88, 91.

(*i*) See *Davenport v. Rylands*, L. R. 1 Eq. 302, case of injunction to stay infringement of patent.

(*k*) See Lord Cairns's judgment in *Ferguson v. Wilson*, *ubi supra*; and see *Soames v. Edge*, Johns. 669; *Norris v. Jackson*, 1 J. & H. 319; *Darbey v. Whitaker*, 4 Drew. 134.

(*l*) *Durell v. Pritchard*, L. R. 1 Ch. Ap. 244.

(*m*) *Catton v. Wyld*, 32 Beav. 266. See *Curriers Co. v. Corbett*, 2 Dr. & Sm. 355.

(*n*) *Corporation of Hythe v. East*, L. R. 1 Eq. 620.

(*o*) *Chinnock v. Marchioness of Ely*, 2 H. & M. 220; reversed on other grounds, 11 Jur. N. S. 329; *Middleton v. Magnay*, 2 H. & M. 233.

[where the injury is too trivial to evoke the interference of the court. (*p*) In such cases the dismissal of the bill is without prejudice to the plaintiff's right to bring an action. (*q*) Even where the court has power to grant the primary equitable relief, it will not always restrain the plaintiff from suing at law for damages, if the action and suit, though arising out of the same transaction, are for different objects; as, *e. g.* where B. failed to perform his contract with A., it was held that A., pending a suit for the cancellation of the bills of exchange which formed the consideration for the contract and for an injunction, might also sue at law for damages for breach of the contract which could not have been specifically enforced. (*r*) The right to damages may be forfeited by the plaintiff's own laches. (*s*)

The statutory remedy by way of damages, being merely subsidiary to the primary equitable relief, it is only necessary to consider in what cases a suit for specific performance will lie. The jurisdiction, we may premise, is purely equitable.

The principle by which courts of equity have professed to be guided in decreeing specific performance of a contract for purchase is, that damages at law may not, in the particular case, afford a complete remedy; (*t*) they will, therefore, decline to interfere if the subject matter of the contract be such that both vendor and purchaser would be reimbursed by damages, (*u*) as in an ordinary (*v*) agreement for

Inadequacy of damages, principle on which specific performance decreed.

(*p*) *Clarke v. Clarke*, L. R. 1 Ch. Ap. 16.

(*q*) *Robson v. Whittingham*, L. R. 1 Ch. Ap. 442; and see *Clarke v. Clarke*, L. R. 1 Ch. Ap. 16.

(*r*) *Anglo-Danubian Co. v. Rogerson*, L. R. 4 Eq. 3.

(*s*) *Lancaster v. De Trafford*, 8 Jur. N. S. 873; *Collins v. Stuteley*, 7 W. R. 710.

(*t*) See *Adderley v. Dixon*, 1 Sim. & Stu. 610; *Paris C. Co. v. Crystal Palace Co.* 1 Jur. N. S. 720.

(*u*) The court will not interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained. *Errington v. Annesley*, 2 Bro. C. C. 841; *Flint v. Brandon*, 8

Ves. 363; *Rogers v. Challis*, 6 Jur. N. S. 334; *Sears v. Boston*, 16 Pick. 357; *Hatch v. Cobb*, 4 John. Ch. 559; *Columbus &c. R. R. Co. v. Watson*, 26 Ind. 50; *Kempshall v. Stone*, 4 John. Ch. 193; *Hepburn v. Dunlap*, 1 Wheat. 197; *Pennsylvania &c. Co. v. Delaware &c. Co.* 31 N. Y. 91; *Hepburn v. Auld*, 6 Cranch, 262; *Savery v. Spence*, 13 Ala. 561; *Scott v. Bilgerry*, 40 Miss. 119; *Stuart v. The London & North Western Railway Co.* 1 De G., M. & G. 721, and cases in note (2); *Webb v. The Direct London & Portsmouth Railway Co.* 1 De G., M. & G. 521, and cases in note (2); *Richmond v. The Dubuque &c. R. R. Co.* 33 Iowa, 422. The ground of the jurisdiction of a court of equity in

(*v*) As to what special circumstances will affect the general rule, see *Doloret v.*

Rothschild, 1 Sim. & Str. 590; *Pooley v. Budd*, 14 Beav. 34.

[the sale of stock. (*w*) In the case of land, the purchaser's right to sue can never be questioned upon this ground, for the land may, to him, have "a peculiar and special value." (*x*)

The jurisdiction, however, is not confined to contracts for the sale of an interest in land; for although the court will seldom interfere in respect of chattels, partly because of their fluctuating value, and partly because damages at law are a sufficient remedy for a breach of contract, yet, where it is shown that damages are not an adequate compensation, the principle on which the court decrees specific performance is just as applicable to a contract for the sale of chattels as to a contract for the sale of land. Thus a contract for the sale of articles of unique character, as rare china, (*y*) may be enforced; so too, it is conceived, when

The jurisdiction, however, not confined to contracts for sale of land;

but may extend to chattels;

such cases is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by compensation in damages, which, in many cases, would fall far short of the redress, which his situation might require. Whenever, therefore, the party wants the thing in specie, and he cannot otherwise be fully compensated, courts of equity will grant him specific performance. 1 Fonbl. Eq. b. 1, s. 5, note (*o*); Errington v. Annesley, 2 Bro. C. C. (Am. ed. 1844), 341-343, and notes; Madison v. Chinn, 3 J. J. Marsh. 231; Cathcart v. Robinson, 5 Peters, 264; 1 Story Eq. Jur. § 716. The jurisdiction of courts of equity to decree specific performance may be distinctly traced back to the reign of Edward 4. 8 Edw. 4, 4 b; Fonbl. Eq. b. 1, c. 1, s. 15, in note; 1 Story Eq. Jur. § 716.

(*w*) Cud v. Rutter, 1 P. Wms. 570; 1 White & T. L. C. 640; Nutbrown v. Thornton, 10 Ves. 159, 161; Green v. Smith, 1 Atk. 572; Fry Specific Perf. 389, § 658; Sears v. Boston, 16 Pick. 358; Woodward v. Harris, 2 Barb. 439.

(*x*) 1 Sim. & Stu. 610.

(*y*) Falcke v. Gray, 4 Drew. 651, 658; and see Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 390. The true principle of equity is that specific performance of an agreement relating to chattels ought to be decreed when equity

and conscience require it; as in case of pictures and other things of peculiar value and attachment, and when the remedy by action at law for damages would be inadequate, and no compensation or just relief could be otherwise afforded. 2 Kent, 487, note (*d*); Sarter v. Gordon, 2 Hill Ch. 126, 127; Young v. Burton, 1 McMullan, 255. In Clark v. Flint, 22 Pick. 231, 239, Wilde J. said: "The reasons given for a distinction between real and personal estate are not very satisfactory. All, as it seems to me, that can fairly be inferred from the cases on this point is, that in contracts respecting personal estate, a compensation in damages is much oftener a complete and satisfactory remedy than it is in those which relate to real estate. But in all cases, if a party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require." See Corbin v. Tracy, 34 Conn. 325; Murphy v. Clark, 1 Sm. & M. 221, 232; Butler v. Hicks, 11 Sm. & M. 79, 85; Sullivan v. Tuck, 1 Md. Ch. 59; Pusey v. Pusey, 1 Vern. 273; Fells v. Read, 3 Ves. 70. Where a dispute relates to a number of articles, and for some the plaintiff may be compensated in damages, and for others not, specific performance will be enforced as to all. McGowin v. Remington, 12 Penn. St. 56. Nor is it a ground of demurrer to a bill, that it seeks

[the chattels can only be advantageously procured from the person who has contracted to sell them. Thus, a contract for the sale of a barge, (*z*) has been enforced. So of a patent; (*a*) so of the goodwill of a business, where it is sold in connection with the property. (*b*) The courts of law in England now have power to order specific delivery of the chattels or goods sold; (*c*) but this has not ousted the jurisdiction of a court of equity. (*d*)

So, although an agreement for the transfer of stock will not be enforced; (*e*) yet, in the case of shares in a railway or other public company which are limited in number, and not always to be had in the market, (*f*) specific performance may be decreed; (*g*) even though nothing has been paid upon them, and there is no pecuniary consideration for the transfer; (*h*) and, in one case, where the deed of settlement of a joint stock company provided that no shareholder should be at liberty to transfer his shares, except in such manner as the board of directors should sanction, specific performance of a contract for the sale of shares was decreed, notwithstanding the refusal of the directors to allow the transfer; (*i*) and the fact of a call, of which the purchaser has no notice, having been made at the date of the purchase, does not invalidate the contract. (*j*) If the shares are bought through a

specific performance of a contract which relates to personality. *Carpenter v. Mutual Safety Ins. Co.* 4 Sandf. Ch. 408.

(*z*) *Charingbould v. Curtis*, 21 L. J. Ch. 541.

(*a*) *Coquet v. Gibson*, 33 Beav. 557; *Corbin v. Tracy*, 34 Conn. 325. As to chattels generally, and the distinction between contracts and trusts, see *Pooley v. Budd*, 14 Beav. 34; *Pollard v. Clayton*, 1 Jur. N. S. 342, V. C. W.; *Binney v. Annan*, 107 Mass. 94.

(*b*) *Darbey v. Whittaker*, 4 Drew. 134; and see *Cooper v. Hood*, 26 Beav. 293.

(*c*) See common law procedure act, 1854, 17 & 18 Vict. 125, s. 78; and the mercantile law amendment act, 19 & 20 Vict. c. 97, s. 2. *Ante*, 624, 625.

(*d*) See *Falcke v. Gray*, 4 Drew. 651.

(*e*) *Cud v. Rutter*, 1 P. Wms. 570; but a contract for the sale of an annuity, payable out of the dividends of stock, may be enforced. See *Withy v. Cottle*, 1 Sim. & Stu. 174; 1 Turn. & R. 78; *Adams v.*

Blackwall Railway Co. 13 Jur. 620; *S. C.* 2 Mac. & G. 118; *Clifford v. Turrill*, 1 Yo. & Col. C. C. 138.

(*f*) See *Duncuft v. Albrecht*, 12 Sim. 189; affirmed, 199.

(*g*) *Shaw v. Fisher*, 2 De G. & S. 11; *Wynne v. Price*, 3 De G. & S. 310. In *Leach v. Fobes*, 11 Gray, 511, *Bigelow J.* said: "The more recent authorities are quite decisive as to the authority of a court of chancery to decree the specific performance of a contract for the transfer of shares in joint stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount, and the number of shares is limited." See *Todd v. Taft*, 7 Allen, 371; *Fry Specif. Perf.* (Am. ed.) 52-54, § 24 *et seq.*; 1 *Sugden V. & P.* (8th Am. ed.) 210, note (*r*); 1 *Story Eq. Jur.* §§ 724, 725.

(*h*) *Cheale v. Kenward*, 3 De G. & J. 27.

(*i*) *Poole v. Middleton*, 29 Beav. 646.

(*j*) *Hawkins v. Maltby*, L. R. 3 Ch.

[broker, the purchaser takes subject to the established usages of the stock exchange. (*k*)

Before, however, the court will decree specific performance of a contract to take shares, it must be conclusively shown that the remedy at law is inadequate. (*l*)

where damages would be an inadequate remedy.

The fact of the land, the subject-matter of the contract, being out of the jurisdiction, is no bar to the suit, if the parties are subject to the jurisdiction of the court. (*m*)

A vendor has a mere pecuniary demand against his purchaser who refuses to complete, which may be enforced by an action at law. If the conveyance has been executed, he may, in such action, recover the whole purchase-money; if no conveyance has been executed, he has the land, and may recover the difference between the price agreed upon and the estimated price on a resale; and, in either case, any special damage which he may have sustained by

On ground of mutuality of remedy, vendor wanting only purchase money, may sue in equity.

Ap. 188; reversing V. C. W. L. R. 4 Eq. 572. See this case as to the right of the original vendor to enforce specific performance against a sub-purchaser, where there has been a series of successive sales and purchases; but in Ireland (Sheppard v. Murphy, Ir. Rep. 1 Eq. 490), specific performance has been refused in such a case, on the ground of want of privity of contract between the vendor and sub-purchaser. See, too, Grissell v. Bristowe, L. R. 3 C. P. 112; Davis v. Hayock, L. R. 3 Exch. 373.

(*k*) *Stray v. Russell*, 5 Jur. N. S. 1295; affirmed, 6 Jur. N. S. 168.

(*l*) *Oriental Inland Steam Co. v. Briggs*, 2 H. & M. 625.

(*m*) *Penn v. Lord Baltimore*, 1 Ves. sen. 445; 2 White & T. L. C. 767; *Jackson v. Petrie*, 10 Ves. 164; *Cood v. Cood*, 33 Beav. 314; 9 Jur. N. S. 1335. A suit for the specific performance of a contract for the conveyance of land proceeds *in personam*, and may be maintained in any court of equity which has jurisdiction of the parties, even where the land lies in another state or foreign country. *Brown v. Desmond*, 100 Mass. 269; *Pingree v. Coffin*, 12 Gray, 304, 305; *Davis v. Parker*, 14 Allen, 98; 2 Dan. Ch. Pr. (4th

Am. ed.) 1031, note (8); *Dehon v. Foster*, 4 Allen, 545; *Stephenson v. Davis*, 56 Maine, 75; *Great Falls Manuf. Co. v. Wooster*, 23 N. H. 462; *Cleveland v. Burnell*, 25 Barb. 532; *Newborn v. Bronson*, 3 Kernan, 587; *Gardner v. Ogden*, 22 N. Y. 327; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, 2 Paige, 615; *Sutphen v. Fowler*, 9 Paige, 282; *Ward v. Arredondo*, 1 Hopk. 213; *Massie v. Watts*, 6 Cranch, 158, 160; *Watts v. Waddle*, 6 Peters, 389; *Watkins v. Holman*, 16 Peters, 25; *Carrington v. Brents*, 1 McLean, 167; *White v. White*, 7 Gill & J. 208; *Stansbury v. Fringer*, 11 Gill & J. 149; *Penn v. Hayward*, 14 Ohio (N. S.), 302; *Davis v. Headley*, 7 C. E. Green, 115; *Wood v. Warner*, 2 McCarter (N. J.), 81; 1 Story Eq. Jur. §§ 743, 744; *Fry Specif. Perf.* (2d Am. ed.) 69, § 60, *et seq.* But where the land is situated in a foreign state, the statute of frauds of that state must govern as to the validity of a contract for conveyance thereof. *Grover J. in Burrell v. Root*, 40 N. Y. 498. As to enforcing claim against the proceeds of sale of land out of the jurisdiction, see *Waterhouse v. Stansfield*, 9 Hare, 234; 10 Hare, 254.

[reason of the breach. His case is not, therefore, one in which the relief at law is inadequate; but upon the principle of affording mutual remedies, the courts will nevertheless entertain a vendor's bill, (n) in every case where the purchaser might sue for specific performance of the contract; and it makes no difference whether the consideration be a life annuity, or a gross sum; (o) and although the consideration be paid, the right of the vendor to be relieved from liabilities attaching to the ownership will sustain the suit. (p)

Upon a purchase by a railway company, it is no defence to the land-owner's suit that the price of the land, and the compensation for damage consequential on its purchase, are by the agreement amalgamated in a single sum. (q)

In some of the earlier cases specific performance of contracts to
As to build-
ing contracts. build and execute works has been decreed in equity; but in a recent case, (r) *V. C. Wood* considered that the later authorities were entirely opposed to such a practice; and that the proper course in such cases was to direct an inquiry as to damages. Thus, where the agreement was to grant a lease, so soon as the lessee should have built a house of a specified value, "according to a plan to be submitted to and approved by the lessor," and which the lessee agreed to do, and to take the lease, specific performance at the suit of the lessor was refused. (s) In a later case, where there was an agreement for a lease with a stipulation that the lessor should put the house "in substantial and

(n) *Withy v. Cottle*, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Kenny v. Wexham*, 6 Madd. 355; *Clifford v. Turrell*, 1 Yo. & Col. C. C. 138. See *V. C. Wigram's judgment*, in *Adams v. Blackwall Railway Co.* 13 Jur. 621; *Webb v. Direct London &c. Railway Co.* 1 De G., M. & G. 528; *Regent's Canal Co. v. Ware*, 23 Beav. 575; *Coquet v. Gibson*, 33 Beav. 557; *Phillips v. Berger*, 8 Barb. 527; *Lewis v. Ld. Lechmere*, 10 Mod. 503; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; *Hilliard v. Allen*, 4 Cush. 532. It has been held in Pennsylvania that a bill by a vendor, for specific performance, will not be entertained where the object is merely to obtain payment of the purchase-money. *Deck's Appeal*, 57 Penn. St. 467; *Kauffman's Appeal*, 55 Penn. St. 383.

(o) *Clifford v. Turrell*, 1 Yo. & Col. C.

C. 138; affirmed, 9 Jur. 623. As to the small amount of the purchase-money being no bar to the jurisdiction, see *Bennett v. Smith*, 16 Jur. 421. *Sed quære*, where the suit is by the vendor.

(p) See *Shaw v. Fisher*, 2 De G. & S. 11; on further directions, 1 Jur. N. S. 971; affirmed, 1055; 5 De G., M. & G. 596; *Cheale v. Kenward*, 3 De G. & J. 27; *Wynne v. Price*, 3 De G. & S. 310. See *Humble v. Langston*, 7 M. & W. 517; *Walker v. Bartlett*, 17 C. B. 446; affirmed, 2 Jur. N. S. 643.

(q) *Webb v. Direct London &c. Railway Co.* 9 Hare, 129, 139; reversed on the general question, 1 De G., M. & G. 521.

(r) *Kay v. Johnson*, 2 H. & M. 118. See, too, *Cooper v. Jarman*, L. R. 3 Eq. 98.

(s) *Brace v. Wehnert*, 25 Beav. 348.

[decorative repair," the court decreed specific performance at the suit of the lessee, with an inquiry whether the repairs had been properly executed, and if not, then an inquiry as to damages. (*t*) Here, however, the court did not affect to enforce the agreement to repair. In an earlier case, the court of appeal held that an agreement to take a lease, if the house were put "into thorough repair," and the drawing-rooms, "handsomely decorated according to the present style," could not be enforced at the suit of the lessor, but the decision seems to have rested on the ground that the terms used were too indefinite to be enforced. (*u*)

A distinction has, however, been drawn between the case of a contract with a builder to build a house, and a case of a contract for the sale and purchase of land, where some stipulated building or work has to be carried out by either party, by way of easement, or of accommodation for the other. Thus, in a recent case, where A. agreed to sell a piece of land to B., and A. was to make a new road, of which B. was to have the user, and B. was to expend 3,000*l.* in building a house upon the land, it was held that there was nothing in the nature of the contract to prevent its being specifically enforced. (*v*) So, where a railway company agreed with a land-owner, through whose estate their line would pass, to construct and maintain a siding, with all necessary approaches for public use, the court decreed specific performance of the contract, so far as it related to the construction of the siding; and a stipulation in the agreement as to the proper maintenance of the work when constructed, was held to be no reason for withholding relief. (*w*) So, in a very recent case, where a railway company in purchasing land, agreed with the vendor that a portion of it should be "forever thereafter used and employed as and for a first-class station or place for the purpose of taking up, and setting down passengers," the vendor was held entitled to a decree ordering the company to supply the necessary accommodation for a first-class station (to be ascertained at chambers). (*x*) So, too, in a suit for specific perform-

Distinction where the building or other work is by way of easement or accommodation.

(*t*) *Samuda v. Lawford*, 8 Jur. N. S. 739; *Middleton v. Greenwood*, 2 De G., J. & S. 142.

(*u*) *Taylor v. Portington*, 7 De G., M. & G. 328.

(*v*) *Wells v. Maxwell*, 32 Beav. 408; affirmed, 9 Jur. N. S. 1021; but the point

which we are considering does not appear to have been argued on the appeal.

(*w*) *Lytton v. Great Northern Railway Co.* 2 K. & J. 394. See, too, *Sanderson v. Cockermouth & c. Railw. Co.* 11 Beav. 497.

(*x*) *Hood v. North Eastern Railway Co.* L. R. 8 Eq. 666.

[ance, a railway company was compelled to construct a drain under their line for the convenience of an adjoining proprietor. (*y*) These cases seem to show that the reason often alleged for the refusal of the court to interfere in the case of building contracts, viz. that it has no sufficient means of ascertaining whether the work has been properly executed, or the stipulated amount expended thereon, (*z*) is not always an operative reason. Where the default is on the part of the vendor, the court may in some cases virtually enforce it, by allowing the purchaser to execute the work, and to deduct his costs of doing so from his unpaid purchase-money. (*a*)

So, part performance of a contract of this description has, in some cases, been held to give the court a jurisdiction to enforce it, which it would not have had, if the contract had remained wholly incomplete. Thus, where a conveyance contained a covenant by the purchasers with the vendor that they would make a road and erect a market-house, and they entered into possession and made the road, but neglected to build the market-house, V. C. Wigram observed that the purchasers having had the benefit of the contract *in specie*, the court would go any length that it could to compel them to perform their obligations under it; (*b*) but unless the terms of the contract are sufficiently definite, part performance cannot be relied on as a ground for enforcing it. (*c*)

The result seems to be that, as a general rule, the court will not

(*y*) *Powell v. Great Western Railway Co.* 1 Jur. N. S. 773.

(*z*) See *Brace v. Wehnert*, 25 Beav. 348.

(*a*) See, and consider, *Wells v. Maxwell*, 32 Beav. 408; 9 Jur. N. S. 565, 567.

(*b*) *Price v. Corporation of Penzance*, 4 Hare, 506. See, too, *Storer v. Great Western Railway Co.* 2 Yo. & Col. C. C. 48; *Greene v. West Cheshire Railway Co.* L. R. 13 Eq. 44; *Wilson v. Furness Railway Co.* L. R. 9 Eq. 33, 34; *Richmond v. The Dubuque & Sioux City R. R. Co.* 33 Iowa, 482.

(*c*) *South Wales Railway Co. v. Wythes*, 1 K. & J. 200, and see judgment; 5 De G., M. & G. 880; 1 Sugden V. & P. (8th Am. ed.) 154-157; *Mortal v. Lyons*, 8 Ir. Ch. Rep. 112; *Rice v. O'Connor*, 11 Ir. Ch. Rep. 510; *Waters v. Howard*, 8

Gill, 277; *Hall v. Hall*, 1 Gill, 383; *Moale v. Buchanan*, 11 Gill & J. 314; *Graham v. Yeates*, 6 Harr. & J. 229; *Aday v. Echols*, 18 Ala. 353; *Owens v. Baldwin*, 1 Md. Ch. 123; *German v. Machin*, 6 Paige, 288; *Phyfe v. Wardwell*, 1 Edw. Ch. 51, 52; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274, 284; *Phillips v. Thompson*, 1 John. Ch. 131; *Anthony v. Leftwick*, 3 Rand. 238, 246; *Miller v. Cotten*, 8 Geo. 341, 351; *McGibbeny v. Burmaster*, 53 Penn. St. 332; *Sage v. M'Guire*, 4 Watts & S. 228, 229; *Tilton v. Tilton*, 9 N. H. 385; *Allen v. Chambers*, 4 Ired. Eq. 125; *Richardson v. Eyton*, 2 De G., M. & G. 79; *Oxford v. Provand*, L. R. 2 P. C. 135; *Mortimer v. Orchard*, 2 Ves. jr. 243; *Ryno v. Darby*, 5 C. E. Green, 231; *Reynolds v. Waring*, Yo. 346; *Mundy v. Joliffe*, 9 Sim. 413.

[entertain a suit for the specific performance of a contract, wholly or principally for the erection of buildings, or the execution of other specified works, by either party; but that, where the contract has been partly performed, and the parties cannot be restored to their original position, or where the execution of the stipulated work is only a subsidiary term of the contract, specific performance may, but will not necessarily, be decreed. (*d*)

General remarks on the cases.

So, too, partly on the ground of the incapacity of the court to execute the contract, and partly in consequence of the uncertainty of the subject-matter, specific performance of an agreement for the sale of the good-will of a business is refused; (*e*) except in cases where the good-will is sold in connection with the property to which it is attached; (*f*) but the court will interfere by injunction to restrain a breach of an agreement not to carry on a similar business within specified limits; (*g*) which, however, must be reasonable. (*h*)

Contract for sale of good-will not enforced except in what cases;

So, as a general rule, the court will not enforce an agreement to become partners, (*i*) or to contribute a specified sum towards the partnership capital; (*j*) for in such cases its decree would be either wholly nugatory, or incapable of being adequately enforced, (*k*) and as a general rule a contract for *personal services* cannot be specifically enforced by either party. (*l*)

nor a contract to become partners;

(*d*) See *Paxton v. Newton*, 2 Sm. & G. 437; *Norris v. Jackson*, 1 J. & H. 319.

(*e*) See *Baxter v. Conolly*, 1 J. & W. 576; *Coslake v. Till*, 1 Russ. 376.

(*f*) See *Darbey v. Whittaker*, 4 Drew. 134, 140; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Cruttwell v. Lye*, 17 Ves. 346; *Allison v. Monkwearmouth*, 4 El. & Bl. 13.

(*g*) *Avery v. Langford*, Kay, 663; 2 Dan. Ch. Pr. (4th Am. ed.) 1654; *Sainter v. Ferguson*, 1 Mac. & G. 286; *Angier v. Webber*, 14 Allen, 211; *Leather Cloth Co. v. Lorsont*, L. R. 9 Eq. 345; *Kerr Inj.* 507 *et seq.*

(*h*) See *Harms v. Parsons*, 32 Beav. 328, and cases cited; *Kerr Inj.* 510.

(*i*) See *Sheffield Gas Co. v. Harrison*, 17 Beav. 294; and see 2 *Lindley Partn.* 947-949. *Lord Hardwicke Ch. in Buxton*

v. Lister, 3 Atk. 385; *England v. Curling*, 8 Beav. 137, 138; *Scott v. Rayment*, L. R. 7 Eq. 112; *Birchett v. Bolling*, 5 Munf. 42; *Downs v. Collins*, 6 Hare, 418, 437; *Hercy v. Birch*, 9 Ves. 357.

(*j*) *Sichel v. Mosenthal*, 30 Beav. 471. See *Shadwell V. C. in Kemble v. Kean*, 6 Sim. 335.

(*k*) An agreement to make a will in favor of a party cannot be specifically enforced. But equity will in some cases provide a remedy for a breach of such an agreement. See *Brinker v. Brinker*, 7 Barr, 53; *McClure v. McClure*, 1 Barr, 378; *Mundorff v. Kilbourn*, 4 Md. 459, 463.

(*l*) See *Johnson v. Shrewsbury & Birmingham Railway Co.* 3 De G., M. & G. 926; *Pickering v. Bishop of Ely*, 2 Yo. &

[The court has refused to enforce, on behalf of a lessor, a contract for a yearly tenancy ; (*m*) nor will it, except under very special circumstances, enforce an agreement for a lease, when the term has expired by effluxion of time. (*n*)

nor a contract
for a yearly
tenancy.

An agreement to insure may be specifically enforced in equity; and the bill may be filed after a loss has occurred. (*o*) Specific performance may be decreed of

To insure.

an agreement for the purchase of a copyright. (*p*)

Copyright.

In equity an award is considered as an agreement, and will be enforced in those cases in which if the terms of it were embodied in the form of an agreement, it would be enforced. (*q*) An award to convey an estate or the like will, therefore, be enforced ; (*r*) but not, it would seem, an award to pay money, (*s*) nor an award that a lease shall be granted by A. to B., and that B. shall perform certain duties during the continuance of the lease, as the court cannot enforce specific performance of the latter part. (*t*)

Award.

A contract to write a book cannot be specifically executed ; (*u*) but a contract *not* to write except for a particular person, is good, and will be enforced in equity. (*v*)

To write a
book.

Col. C. C. 249, 267 ; *Rolfe v. Rolfe*, 15 Sim. 89 ; *Lumley v. Wagner*, 1 De G., M. & G. 604 ; *Brett v. East India &c. Co.* 2 H. & M. 404 ; *Mair v. Himalaya Tea Co.* L. R. 1 Eq. 411 ; *Stoker v. Brocklebank*, 3 Mac. & G. 250 ; *Richmond v. The Dubuque &c. R. R. Co.* 33 Iowa, 480.

(*m*) *Clayton v. Illingworth*, 10 Hare, 451 ; and see an article, 3 Jur. N. S. 201. But an agreement for a lease will be enforced, where there remains a considerable portion of the time for which the lease agreed for was to run. See *Furnival v. Crew*, 3 Atk. 83 ; *Iggulden v. May*, 9 Ves. 325 ; *Tritton v. Foote*, 2 Bro. C. C. 636 ; *In re Doolan*, 3 Dru. & W. 442.

(*n*) See *Walters v. Northern Coal M. Co.* 2 Jur. N. S. 1 ; affirmed, 5 De G., M. & G. 629 ; *Wilkinson v. Torkington*, 2 Yo. & Col. Ex. 726. In *Ashton v. Corrigan*, L. R. 13 Eq. 76, the court made a decree for specific performance of a contract, by which the defendant had agreed to execute to the plaintiff a mortgage of certain leasehold premises in the usual form, containing an absolute power of sale, in con-

sideration of money due, but had, when requested to do so, failed to execute such mortgage. See *Fraser v. Thomas, Seton Dre.* (3d Eng. ed.) 443, 448 ; *Hermann v. Hodges*, L. R. 16 Eq. 18.

(*o*) *The Union Mutual Insurance Co. v. The Commercial Mut. Mar. Ins. Co.* 2 Curtis C. C. 524 ; *Perkins v. Washington Ins. Co.* 4 Cowen, 645 ; *Tayloe v. Merchants' Fire Ins. Co.* 9 How. (U. S.) 405 ; *Carpenter v. Mutual Ins. Co.* 4 Sandf. Ch. 408.

(*p*) *Thombleson v. Black*, 1 Jur. 198. As to a contract for the conveyance of a vessel, see per *Curtis J.* in the *Union Mutual Ins. Co. v. The Commercial Mut. Mar. Ins. Co.* 2 Curtis C. C. 545.

(*q*) *Wood v. Griffith*, 1 Swanst. 43 ; *Blackett v. Bates*, L. R. 1 Ch. Ap. 117.

(*r*) *Norton v. Mascall*, 2 Vern. 24.

(*s*) *Hall v. Hardy*, 3 P. Wms. 189, note.

(*t*) *Blackett v. Bates*, L. R. 1 Ch. Ap. 117.

(*u*) *Clarke v. Price*, 2 Wils. Ch. 157.

(*v*) *Morris v. Coleman*, 18 Ves. 347.

[A contract *to perform* at a particular theatre, though it cannot be specifically executed, will be negatively enforced by injunction restraining performance elsewhere, whether there is, (*w*) or is not (*x*) the further agreement *not to perform elsewhere*. Where there is a contract of a negative character, *e. g.* not to carry on a particular business, (*y*) not to build, (*z*) or the like, the remedy is by injunction restraining the party from doing the act which he has contracted not to do. (*a*)

To perform at a particular place.

Whether the mere fact of the defendant being bound under a legislative act to complete the contract, and of the plaintiff having an easier remedy by *mandamus*, will prevent the latter from resorting (if he please) to a court of equity, has been doubted. (*b*)

Whether existence of easier remedy by *mandamus* is a bar.

Where a railway company takes land by private contract, the jurisdiction of the court to enforce particular stipulations as to easements, &c., is not ousted by the provisions of the railway acts. (*c*) ✓

If the plaintiff proceeds both at law and in equity for the same subject-matter, he may, by order of court, be compelled to elect between his action and suit; (*d*) and this relief has been afforded where a landlord had filed a bill against his tenant for specific performance of an agreement to take a lease, and was also suing him for use and occupation of the premises during part of the term; (*e*) but where the action is brought for the non-performance of particular acts, — *e. g.* to improve or repair the property, — the performance of which is

Plaintiff cannot proceed at once at law and in equity.

(*w*) *Lumley v. Wagner*, 1 De G., M. & G. 604.

(*x*) *Webster v. Dillon*, 3 Jur. N. S. 432; overruling *Kemble v. Kean*, 6 Sim. 333.

(*y*) *Chesman v. Nainby*, 1 Bro. P. C. 234; *Barret v. Blagrave*, 5 Ves. 555; *Williams v. Williams*, 2 Swanst. 253; *Whittaker v. Howe*, 3 Beav. 383; *Clarkson v. Edge*, 12 W. R. 518; *Clements v. Welles*, L. R. 1 Eq. 200.

(*z*) *Rankin v. Huskisson*, 4 Sim. 13.

(*a*) See *Lumley v. Wagner*, 1 De G., M. & G. (Am.), 616 and notes.

(*b*) See *Walker v. Eastern Counties Railway Co.* 6 Hare, 594; *Adams v. Blackwall Railway Co.* 13 Jur. 620, V. C. W.; reversed on appeal, 2 Mac. & G.

118; *Pinchin v. London & Blackwall Railway Co.* 1 K. & J. 34; 5 De G., M. & G. 851; 1 Sugden V. & P. (8th Am. ed.) 79–81. See, also, *Hyde v. Edwards*, 12 Beav. 160, 253; *Leominster Canal Co. v. Shrewsbury & Hereford Railway Co.* 3 K. & J. 654; *Regent's Canal Co. v. Ware*, 23 Beav. 575.

(*c*) *Regent's Canal Co. v. Ware*, 23 Beav. 575.

(*d*) 1 Dan. Ch. Pr. (4th Am. ed.) 815, 816; *Royle v. Wynne*, Cr. & Ph. 252; *Anon.* 2 L. T. 60; and see *Faulkner v. Llewellyn*, 10 W. R. 506, V. C. K.; *Gedye v. Duke of Montrose*, 26 Beav. 45, 47.

(*e*) *Ambrose v. Nott*, 2 Hare, 649. See *Hole v. Pearce*, 5 Hare, 408.

[not specifically prayed by the bill, or which are acts the specific performance of which cannot be decreed, and the action is brought only for such damages as were sustained up to the time of its commencement, no case for election seems to arise. (*f*) And where, before Lord Cairns's act, (*g*) a plaintiff in equity might at the same time have sued for damages at law, he may still do so, notwithstanding that damages might have been asked for and obtained in equity. (*h*)

And although the agreement may in itself vest in the purchaser the interest contracted for, yet, if it appear on its face that a further instrument is necessary to carry out the intentions of the parties, the court will decree specific performance of the agreement in that particular. (*i*) And the court will decree specific performance of a special stipulation in the agreement, *e. g.* that the vendor shall give a bond against carrying on a specified trade within certain limits; (*k*) that is, if the agreement be one which has been performed, or can be enforced, in all its other material terms. (*l*)

Lastly, we may remark that the granting or withholding of relief in suits for specific performance is always a matter of discretion with the court, (*m*) a discretion, however, which is to be exercised, not arbitrarily, but according to fixed and settled rules, and to be regulated upon grounds which will make it judicial. (*n*)

(*f*) See *Fennings v. Humphery*, 4 Beav. 1, 7.

(*g*) 21 & 22 Vict. c. 27.

(*h*) See *Anglo-Danubian Co. v. Rogers*, L. R. 4 Eq. 3.

(*i*) *Fenner v. Hepburn*, 2 Yo. & Col. C. C. 159.

(*k*) *Avery v. Langford*, Kay, 663; and see *Harms v. Parsons*, 32 Beav. 328, as to what are reasonable limits.

(*l*) *South Wales Railway Co. v. Wythes*, 1 Kay & J. 186; affirmed, 5 De G., M. & G. 880; *Pollard v. Clayton*, 1 Kay & J. 462.

(*m*) *Cox v. Middleton*, 2 Drew. 209; *Pyrke v. Waddington*, 10 Hare, 1; *Watson v. Marston*, 4 De G., M. & G. 230; *Bennett v. Smith*, 16 Jur. 422; *Waters v. Howard*, 1 Md. Ch. 112; 8 Gill, 262. In *Harnett v. Yielding*, 2 Sch. & Lef. 554, Lord Redesdale says, that courts of equity

will refuse specific performance of agreements, "when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged." See *Lehmann v. McArthur*, L. R. 3 Ch. Ap. 503; *Willard v. Tayloe*, 8 Wallace, 557.

(*n*) See *White v. Damon*, 7 Ves. 30, 35; *Haywood v. Cope*, 25 Beav. 140, 151; *Hall v. Warren*, 9 Ves. 608; *Daniel v. Frazer*, 40 Miss. 507; *McNeil v. Magee*, 5 Mason, 255; *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608; *Eastman v. Plumer*, 46 N. H. 464; *Jackson v. Ashton*, 11 Peters, 229; *St. John v. Benedict*, 6 John. Ch. 117; *Seymour v. Delancey*, 6 John. Ch. 225; *Minturn v. Seymour*, 4 John. Ch. 497; *Seaman v. Van Rensselaer*, 10 Barb. 83; *Waters v. Howard*, 8 Gill, 262; *Tobey v. Bristol Co.* 3 Story, 800; *Howard v. Moore*, 4 Sneed (Tenn.),

Specific performance when decreed, although contract may vest estate in purchaser.

[2. *By whom Specific Performance may be enforced.*

Equity will enforce specific performance of the contract for sale at the suit of the purchaser himself, or of his representatives in interest; such interest, it must be remembered, being the right to take the estate on the payment of the purchase-money; *e. g.* his alienees by act *inter vivos*, (*o*) or assignees in bankruptcy, or committees in lunacy, (*p*) or, in case of his death, by his real or personal representatives (according to the nature of the estate contracted for).

By whom specific performance may be enforced. Enforced in equity at suit of purchaser, or representatives in interest;

So the contract for purchase may be enforced at the suit of the vendor himself, or his representatives in interest; such interest, it must be remembered, being the right to receive the purchase-money on a conveyance being given of the estate; *e. g.* his alienees by act *inter vivos*, (*q*) or assignees in bankruptcy, or committees in lunacy, (*r*) or (in the case of death) by his executors or administrators; (*s*) so, if the contract have been entered into by a tenant for life, in due (*t*) exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainder-man. (*u*) But equity will not, as a general rule, enforce specific performance at the suit of one who is not a party nor privy to the contract. (*v*)

or of vendor or his representatives in interest.

317; *Hester v. Hooker*, 7 Sm. & M. 535; *Western R. R. Co. v. Babcock*, 6 Met. 346; *Watson v. Marston*, 4 De G., M. & G. 230. The period at which the court is to examine the agreement between the parties, is the time when they contracted. *Revell v. Hussey*, 2 Bal. & B. 288; *Ellard v. Ld. Llandaff*, 1 Bal. & B. 241; *Jones v. Lee*, 26 L. J. Exch. 9; *Lee v. Kirby*, 104 Mass. 428, per Ames J. Every agreement ought to be in writing, certain and fair in all its parts, and for an adequate consideration. *Tottenham v. Townsend*, 5 Ir. Ch. R. 225; *Tillett v. Chester Bridge Co.* 28 L. T. (N. S.) 863; *Kendall v. Almy*, 2 Sumner, 278; *Carr v. Duval*, 14 Peters, 77; *Seymour v. Delancey*, 6 John. Ch. 225; *Crane v. Decamp*, 6 C. E. Green, 414; *Nichols v. Williams*, 7 C. E. Green, 63; 1 Sugden V. & P. (8th Am. ed.) 211. (*o*) See *Nelthorpe v. Holgate*, 1 Coll.

218. A written or an oral agreement to convey land may be assigned orally. *Curier v. Howard*, 14 Gray, 511; *Brown v. Jones*, 46 Barb. 400. See *Sims v. Killian*, 12 Ired. 252; *Bullion v. Campbell*, 27 Texas, 653.

(*p*) See Shelf. on Lun. 546 *et seq.*

(*q*) See Calv. on Part. (2d ed.) 314; 1 Dan. Ch. Pr. (4th Am. ed.) 194, 196, 197, 285.

(*r*) Shelf. on Lun. 564.

(*s*) *Roberts v. Marchant*, 1 Phil. 370.

(*t*) But not otherwise, *Ricketts v. Bell*, 1 De G. & S. 335.

(*u*) See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 65; *Lowe v. Swift*, 2 Bal. & B. 529; 2 Sugden Powers (6th ed.), 134; 1 De G. & S. 344.

(*v*) *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561.

[3. *Against whom Specific Performance may be enforced.*]

Equity will enforce specific performance of the contract for sale, against the vendor himself, and also against, first, persons claiming under him by a title arising subsequently to the contract (except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract); *e. g.* his assignees in bankruptcy, (*w*) or committees in lunacy, (*x*) or voluntary assignees, (*y*) or judgment creditors, (*z*) or the after-taken wife or husband of the vendor, (*a*) or the vendor's alienees for value (if they purchased with notice of the prior contract, (*b*) or have not taken a conveyance), or (in case of his death) against his real (*c*) or personal representatives (according to the nature of the estate contracted for). (*d*)

Against whom specific performance may be enforced. Enforced against vendor, and parties claiming under him by subsequent title, except purchasers without notice;

It appears, however, to have been considered that a person entering into a verbal contract for a purchase, and obtaining a conveyance, is not bound by notice of an intervening written agreement

(*w*) *Orlbar v. Fletcher* 1 P. Wms. 737; *Taylor v. Wheeler*, 2 Vern. 564; and see 2 Ves. sen. 633; *Parker v. Smith*, 1 Coll. 608.

(*x*) *Shelf. Lun.* 564.

(*y*) See *Hinton v. Hinton*, 2 Ves. sen. 631, 633.

(*z*) *Brunton v. Neale*, 14 L. J. (N. S.) L. C. 8.

(*a*) See *Hinton v. Hinton*, 2 Ves. sen. 633.

(*b*) *Daniels v. Davison*, 16 Ves. 249; *S. C.* 17 Ves. 433; *Lightfoot v. Heron*, 3 Yo. & Col. 586; *Cutts v. Thodey*, 1 Coll. 223; *Fewster v. Turner*, 6 Jur. 144; *Potter v. Sanders*, 6 Hare, 1; *Buttrick v. Holden*, 13 Met. 355; *Hersey v. Giblett*, 18 Beav. 174; *Snowman v. Harford*, 57 Maine, 397; *Glover v. Fisher*, 11 Ill. 666; *Hoagland v. Latourett*, 1 Green Ch. 254; *Haughwout v. Murphy*, 6 C. E. Green, 118; *Walker v. Cox*, 25 Ind. 271; *Baldwin v. Lowe*, 22 Iowa, 367; *Langdon v. Woolfolk*, 2 B. Mon. 105; *Shaw v. Thackray*, 1 Sm. & G. 537; *Barnes v. Wood*, L. R. 8 Eq. 424; *Bishop of Winchester v. Mid-*

Hants Railway Co. L. R. 5 Eq. 17, where specific performance of a contract with a railway company was enforced against another company, who had leased the line. A purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased; 2 Sugden V. & P. (8th Am. ed.) 749, and note (*a*), and numerous cases cited, 756, and notes; *Wright v. Dame*, 22 Pick. 55; *Case v. James*, 29 Beav. 512; *Cory v. Eyre*, 1 De G., J. & S. 149; *Patten v. Moore*, 32 N. H. 382; *Wilson v. Holcomb*, 13 Iowa, 110; *Champion v. Brown*, 6 John. Ch. 398, 403; *Caldwell v. Carrington*, 9 Peters, 86; *Castle v. Wilkinson*, L. R. 5 Ch. Ap. 536, 537; *Clark v. Flint*, 22 Pick. 231.

(*c*) Although not named; *Gell v. Vermedun*, Freem. C. C. 99.

(*d*) See *Newton v. Swazey*, 8 N. H. 9; *Glaze v. Drayton*, 1 Desaus. 190; *Wilkinson v. Wilkinson*, 1 Desaus. 201; *Hill v. Ressegiere*, 17 Barb. 162; *Swartwout v. Burr*, 1 Barb. 495.

[for sale by the vendor, which he acquires previously to the execution of the conveyance. (*e*) But a person who is of right and *de facto* in the possession of a corporeal hereditament, is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title, or alleged title, under which he is in possession, or which he has a right to connect with his possession of the property ; nor can a person who is aware of such possession be heard to deny that he has thereby notice of the title, or alleged title, under which the possession is claimed or enjoyed ; nor is it necessary, for the purpose of fixing notice, that the possession should be continually visible, or without cessation actively asserted, unless there is evidence of intentional abandonment. (*f*) Thus, where purchasers of mines entered into possession under an agreement, but took no conveyance, a subsequent purchaser of the land without any exception of the mines, was held to have bought with notice of the agreement, and to be bound specifically to perform it ; although there was evidence that mining operations had been suspended prior to the date of his purchase. (*g*)

And, secondly, equity will enforce specific performance of the contract for sale against persons claiming under a title which, although prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor ; *e. g.* voluntary alienees ; (*h*) dowress who married since the late dower act came into operation ; (*i*) vendor whose wife, married before the act, refuses to release her dower, where the purchaser is willing to take the estate with compensation ; (*j*) joint tenants claiming by sur-
and against parties claiming under a prior title, which he might have displaced by conveyance.

(*e*) Dawson *v.* Ellis, 1 Jac. & W. 524.

(*g*) Holmes *v.* Powell, 8 De G., M. & G.

(*f*) Per Knight Bruce L. J. in Holmes

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v. Powell, 8 De G., M. & G. 572, 580, 581 ; Penny *v.* Watts, 1 Mac. & G. (Am. ed.) 150, note (2), 165, note (2) ; 2 Sugden V. & P. (8th Am. ed.) 755, note (*a*²). As to constructive notice of the claims of a person in possession, see Penny *v.* Watts, 1 Mac. & G. (Am. ed.) 165, note (2) ; M'Mechan *v.* Griffin, 3 Pick. 149 ; Hewes *v.* Wiswell, 8 Greenl. 94 ; Flagg *v.* Mann, 2 Sumner, 491, 455, 457 ; McCaskle *v.* Amarine, 12 Ala. 17 ; Glass *v.* Hulbert, 102 Mass. 34 ; 4 Kent, 179 ; 2 Sugden V. & P. (8th Am. ed.) 762, note (*a*), where the subject is treated and the cases are cited.

(*h*) Buckle *v.* Mitchell, 18 Ves. 100 ; Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180 ; Willatts *v.* Busby, 5 Beav. 193 ; Stackpoole *v.* Stackpoole, 4 Dru. & W. 320, 352 ; Hinton *v.* Hinton, 2 Ves. sen. 631 ; Brown *v.* Raindle, 3 Ves. 256. But see 2 Sugden V. & P. (8th Am. ed.) 714, note (*t*).

(*i*) 3 & 4 Will. 4, c. 105, ss. 4, 5.

(*j*) Wilson *v.* Williams, 3 Jur. N. S. 810 ; Park *v.* Johnson, 4 Allen, 259 ; Davis *v.* Parker, 14 Allen, 94 ; Presser *v.* Hildebrand, 23 Iowa, 483 ; Leach *v.* Forney, 21 Iowa, 271. See, too, Barnes *v.*

[vorship ; (*k*) and remainder-men, or *cestuis que trust*, in cases where the vendor has contracted in due exercise of a power or pursuant to a trust ; (*l*) subject, nevertheless, to these exceptions : viz. that the contract of a tenant in tail who dies before executing the conveyance, does not affect the interests of the issue in tail or remainder-men ; (*m*) and that the contract of a trustee will not be enforced if the attendant circumstances constituted it a breach of trust. (*n*)

Where one of two executors entered into a contract for the sale of his testator's leaseholds, in the erroneous belief that he had the authority of his co-executor, it was held, on the ground of the mistake, that the purchaser could not insist on the sale being completed, and the court of appeal declined to express any opinion as to whether specific performance of a contract for sale by one executor, apart from his co-executor, can be enforced. (*o*)

A voluntary settlor will not be restrained from selling ; (*p*) but if he contract to sell, he cannot himself enforce specific perform-

Wood, L. R. 8 Eq. 424. It was held, in *Castle v. Wilkinson*, L. R. 5 Ch. Ap. 534 ; 39 L. J. Ch. 843, that where a husband and wife agree to sell her estate in fee-simple, and the purchaser is aware that the estate belongs to the wife, the purchaser cannot compel the husband to convey his interest and accept an abated price. But where a vendor has agreed to sell and convey land, the refusal of his wife to release dower is no defence to an action for specific performance, if the vendee offers to waive the release. *Corson v. Mulvany*, 49 Penn. St. 88.

(*k*) See *Hinton v. Hinton*, 2 Ves. sen. 631, 634 ; *Musgrave v. Dashwood*, 2 Vern. 45, 63. A contract for sale by a joint tenant seems to be, in equity, a severance of the joint tenancy. *Brown v. Raindle*, 3 Ves. 256, 257 ; *Frewen v. Relfe*, 2 Bro. C. C. 220, 224 ; *Kingsford v. Ball*, 2 Giff. App. 1.

(*l*) *Mortlock v. Buller*, 10 Ves. 315 ; *Dowell v. Dew*, 1 Yo. & Col. C. C. 345 ; *Shannon v. Bradstreet*, 1 Sch. & Lef. 52 ; *Morgan v. Milman*, 3 De G., M. & G. 24 ; 1 Sugden V. & P. (8th Am. ed.) 209.

(*m*) 3 & 4 Will. 4, c. 74, s. 47 ; *Frank v. Mainwaring*, 2 Beav. 115 ; *Pryce v.*

Bury, 2 Drew. 11 ; 2 Sugden V. & P. (8th Am. ed.) 467, 468.

(*n*) *Mortlock v. Buller*, 10 Ves. 292 ; *White v. Cuddon*, 8 Cl. & Fin. 766 ; *Shrewsbury &c. Railway Co. v. London & Northw. Railway Co.* 4 De G., M. & G. 115 ; 6 H. L. Cas. 112 ; *Maw v. Topham*, 19 Beav. 576 ; *Barrett v. Ring*, 2 Sur. & G. 43 ; *Mulholland v. Mayor of Belfast*, 9 Ir. Ch. R. 204, 292 ; *Johnson v. Eason*, 3 Ired. Eq. 334 ; 1 Sugden V. & P. (8th Am. ed.) 216, note (*r*). The contracts of guardians touching the property of their infant wards, will not be enforced unless they are strictly equitable, and for the interest of the infants. It is incumbent upon the plaintiff to show that the contract sought to be enforced was such an one as the guardian, acting for the best interests of the infants, might properly have made, and such as the court would have approved and authorized, had authority to make it been asked. *Sherman v. Wright*, 49 N. Y. 227.

(*o*) *Sneesby v. Thorne*, 1 Jur. N. S. 536, V. C. W. ; affirmed *Ib.* 1058 ; 7 De G., M. & G. 399 ; and see *Tarratt v. Lloyd*, 2 Jur. N. S. 371.

(*p*) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

[ance; (*q*) though it may be enforced against him by the purchaser. (*r*) The volunteers have no equity against the purchase-money payable to the settlor; (*s*) but if brought before the court by the purchaser, will not be ordered to pay costs. (*t*) A title depending on the invalidity of a voluntary conveyance, may be forced on a purchaser.

Voluntary settlor cannot enforce his contract to sell.

The contract by a married woman, either with or without her husband's concurrence, for the sale of her real estate not settled to her separate use or appointment (other than her chattels real), is incapable of being enforced against her; (*u*) and the rule applies where she is a trustee for sale. (*v*) Nor will her contract, although signed with the husband's concurrence and in his presence, bind any interest which he may then unknowingly have, or subsequently acquire in the property. (*w*) She may, it seems, without deed acknowledged, elect so as to bind her interest in real estate; and,

Contract for sale of married woman's estate, when capable of being enforced.

(*q*) *Smith v. Garland*, 2 Meriv. 123; *Johnson v. Legard*, Turn. & R. 281; 2 Sugden V. & P. (8th Am. ed.) 720, and cases in note (*b*).

(*r*) *Buckle v. Mitchell*, 18 Ves. 100; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; *Willatts v. Busby*, 5 Beav. 193; 2 Sugden V. & P. (8th Am. ed.) 720, and note (*a*); *Townend v. Toker*, L. R. 1 Ch. Ap. 457, 458.

(*s*) *Daking v. Whimper*, 26 Beav. 568.

(*t*) *Daking v. Whimper*, *ubi supra*.

(*u*) *Emery v. Wase*, 5 Ves. 848; *Davidson v. Gardner*, 1 Sugden V. & P. (8th Am. ed.) 206; *Aylett v. Ashton*, 1 Myl. & Cr. 105. See *Lassence v. Tierney*, 1 Mac. & G. 572; *Field v. Moore*, 19 Beav. 176; 7 De G., M. & G. 691; *Nicholl v. Jones*, L. R. 3 Eq. 696; *Jewett v. Davis*, 10 Allen, 71, 72; *Lane v. McKeen*, 15 Maine, 304; *Boynton v. Hazelboom*, 14 Allen, 107; *Townsley v. Chapin*, 12 Allen, 476; 1 Sugden V. & P. (8th Am. ed.) 206, note (*u*), and cases cited; *Van Allen v. Humphrey*, 15 Barb. 555; *Method. Episcopal Church v. Jaques*, 3 John. Ch. 77; *Bunce v. Vandergrift*, 8 Paige, 37; *Farley v. Palmer*, 20 Ohio St. 223; *Phillips v. Graves*, 20 Ohio St. 371, 390; *Bennett v.*

Oliver, 7 Gill & J. 192; *Helms v. Franciscus*, 2 Bland, 544; *Long v. White*, 5 J. J. Marsh. 230. But see, and consider, *Barrow v. Barrow*, 4 K. & J. 409. Under the General Statutes of Massachusetts, c. 108, s. 3, in which it is provided that "a married woman may bargain, sell, or convey her separate, real, and personal property, and enter into any contracts in reference to the same," a married woman, with the written assent of her husband, given according to the provisions of the same act, may enter into a written executory agreement for the sale of her real estate, and specific performance thereof may be decreed in equity. *Baker v. Hathaway*, 5 Allen, 103. See *Basford v. Pearson*, 7 Allen, 506; *Dresel v. Jordan*, 104 Mass. 407. But such written assent is indispensable. *Townsley v. Chapin*, 12 Allen, 479. An agreement by her husband will not bind her. *Daniel v. Adams*, Amb. 495; 1 Eq. Cas. Abr. 62, pl. 2; *Martin v. Mitchell*, 2 J. & W. 413; *Crofts v. Middleton*, 2 K. & J. 194; S. C. 8 De G., M. & G. 192; 7 Edw. 4, 14 b; *Boynton v. Hazelboom*, 14 Allen, 107.

(*v*) *Avery v. Griffin*, L. R. 6 Eq. 606.

(*w*) *Aylett v. Ashton*, 1 Myl. & Cr. 105.

[having elected, may be ordered to complete her contract, on the ground that she shall not avail herself of fraud. (*x*)

If, having a power of appointment, she enter into a contract executed with the formalities required by the power; (*y*)
Where she is entitled for her separate use, or has power to appoint. or, if, as respects estate settled merely to her separate use, with no restraint on anticipation, she enter into such a contract as would bind her if a *feme sole*, (*z*) the estate, in either case, is bound, although no decree can be made against her personally; (*a*) and even in the case of an agreement in exercise of a power, the want of mere formalities may, it seems, be supplied; *e. g.* where a married woman, having a power to appoint by deed, enters into a contract not under seal, specific performance may be decreed; (*b*) but this, it is conceived, would not be the case where the omission went to the substance of the power, or consisted in want of formalities which were intended for her protection. (*c*) Thus, where a trustee had power to lease at the request in writing of a married woman, and she gave her parol consent to, and executed, a lease, but before the lease was delivered and the counterpart executed, withdrew her consent; it was held, that there was no contract binding upon her. (*d*) Where her separate estate is subject to a restraint on anticipation, this cannot be waived by the court, however much such waiver might apparently be for her advantage. (*e*)

A husband may adopt and enforce his wife's contract. Thus,
A husband may enforce his wife's contract. where a married woman, without her husband's knowledge, induced her father to sell her a field, to be paid for out of her private savings, and he, after some reluctance, accepted the money, and put the husband into possession, which

(*x*) See, and consider, *Barrow v. Barrow*, 4 K. & J. 409, and cases there cited; and see *Sharpe v. Foy*, L. R. 4 Ch. Ap. 35.

(*y*) See 1 Sugden V. & P. (8th Am. ed.) 206; *Daniel v. Adams*, Amb. 498; *Martin v. Mitchell*, 2 Jac. & W. 425; *Heather v. O'Neill*, 2 De G. & J. 417, 418; *Atkinson v. Smith*, 4 Jur. N. S. 963; reversed, Ib. 1160; 3 De G. & J. 186.

(*z*) *Grigby v. Cox*, 1 Ves. sen. 518; *Wainwright v. Hardisty*, 2 Beav. 363; *Stead v. Nelson*, 2 Beav. 245; but see *Harris v. Mott*, 14 Beav. 169; *quære* the *dictum*, 170; and see *Chester v. Platt*, cited 1 Sugden V. & P. 206.

(*a*) *Nantes v. Corrock*, 9 Ves. 189; *Aylett v. Ashton*, 1 Myl. & Cr. 112; *Francis v. Wigzell*, 1 Madd. 258.

(*b*) See *Stead v. Nelson*, 2 Beav. 245; *Dowell v. Dew*, 1 Yo. & Col. C. C. 345.

(*c*) See *Lassence v. Tierney*, 1 Mac. & G. 551, 572; *Thackwell v. Gardiner*, 5 De G. & S. 58, 65; *Hughes v. Wells*, 9 Hare, 749; *Hopkins v. Myall*, 2 Russ. & My. 86.

(*d*) *Phillips v. Edwards*, 33 Beav. 440.

(*e*) *Robinson v. Wheelright*, 2 Jur. N. S. 32; 21 Beav. 214; 6 De G., M. & G. 535.

[was retained ten years without payment either of rent or of interest on the purchase-money, it was held that the husband, who had remained in ignorance of the transaction, was entitled to have the contract specifically performed. ()

In one case (*g*) a question arose, but was not decided, as to whether the wife surviving may adopt her husband's contract for sale of her real estate.

Whether wife may adopt her husband's contract.

And the vendor's contract will, of course, not be enforced against persons claiming under a prior title which he himself could not have displaced by a conveyance; *e. g.* a dowress under the old law, (*h*) or a wife seised of an estate of inheritance; nor will the contract of a tenant for life be enforced against the trustees of the reversion who are empowered but decline to sell at his request. (*i*)

Vendor's contract cannot be enforced against parties claiming under prior absolute title.

So, the contract for purchase will be enforced against the purchaser himself, his committees in lunacy, (*k*) and real and personal representatives. Where the purchaser, having paid part of the purchase-money, became insolvent, and his assignees, upon a bill being filed against them, disclaimed, the court declared the representatives of the vendor absolutely entitled to the estate. (*l*)

Purchaser's contract will be enforced against himself and his representatives.

A married woman's separate estate may be liable under her contract for purchase; (*m*) but the vendor's suit must be directed specifically against such separate estate, and should not seek a decree against her personally. (*n*)

Against separate estate of married woman.

Whether the same relief would be afforded in the case of her parol

(*f*) *Millard v. Harvey*, 33 Beav. 237; 10 Jur. N. S. 1167.

(*g*) *Humphreys v. Hollis*, Jac. 76.

(*h*) But see *Wilson v. Williams*, 3 Jur. N. S. 810.

(*i*) *Thomas v. Dering*, 1 Keen, 729.

(*k*) Shelf. on Lun. 564; 1 Sugden V. & P. 208. "The result of the authorities seems to be that dealings of sale and purchase, by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Lord Cranworth L. C. in *Elliott v. Ince*, 7 De G., M. & G. 475. See *Price v. Berrington*, 3 Mac. & G. 486; 1 Dan. Ch. Pr. (4th Am.

ed.) 85; *Yanger v. Skinner*, 1 McCarter (N. J.), 389; *Gibson v. Soper*, 6 Gray, 279; *Carr v. Holliday*, 5 Ired. Eq. 167; 1 Sugden V. & P. (8th Am. ed.) 208, 209.

(*l*) *Gabriel v. Sturgis*, 5 Hare, 97.

(*m*) See *Holme v. Tenant*, 1 Bro. C. C. 16; 1 White & T. L. C. 324, and cases cited in next note.

(*n*) *Francis v. Wigzell*, 1 Madd. 258; and see *Murray v. Barlee*, 4 Sim. 82; *Owens v. Dickenson*, Cr. & Ph. 48; *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192; *Gaston v. Frankum*, 2 De G. & S. 561; *Dowling v. Maguire*, Ll. & G. t. Plunk. 1, 19; *Owen v. Homan*, 3 Mac. & G. 378; *Hughes v. Wells*, 9 Hare, 773; *Crofts v. Middleton*, 8 De G., M. & G. 192.

[contract followed by part performance, seems to be somewhat doubtful. (*o*)

4. *As to the Parties to the Suit.*

In general, it is only necessary to make those persons parties to a suit for specific performance who were parties to the contract. (*p*) For instance, a purchaser cannot join as co-defendants the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title-deeds, delivery of which is sought by the suit; (*q*) nor, it would seem, the wife of the vendor who has possessed herself of the deeds; (*r*) nor a mortgagor whose mortgagee, or mortgagee's trustee, has entered into the contract under a mortgage power of or trust for sale; (*s*) nor, upon a sale by a mortgagor, the mortgagee, nor any person interested in the equity of redemption; (*t*) nor a person who has joined the vendor in the sale in respect of other property, under conditions, as to laying out roads, &c., affecting the whole estate; (*u*) nor, as a general rule, any person upon the ground of his claiming any adverse interest which was vested in him prior to the contract. (*v*)

Nor need a stranger to a contract be made a party to a suit on the ground of his being interested in the contract, or bound to concur in the conveyance; as where, on the

(*o*) But see *Vaughan v. Vanderstegen*, 2 Drew. 183. The precise extent to which the separate estate of a married woman is liable for her general personal engagements, must still be regarded as unsettled. See *Johnson v. Gallagher*, 30 J. L. Ch. 298; 3 De G., F. & J. 494; *Blackford v. Wooley*, 9 Jur. N. S. 568; *Shuttock v. Shuttock*, L. R. 2 Eq. 182; *Tullett v. Armstrong*, 4 Beav. 319; *Mrs. Matthewman's case*, L. R. 3 Eq. 781; *Hobday v. Peters*, 28 Beav. 354; *Dowling v. Maguire*, Ll. & G. t. Plunk. 1; *Willard v. Eastman*, 15 Gray, 328, 335; *Rogers v. Ward*, 8 Allen, 387; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; 2 Sugden V. & P. 686.

(*p*) *Humphreys v. Hollis*, Jac. 75; *Wood v. White*; 4 Myl. & Cr. 460; but see

Daking v. Whimper, 26 Beav. 568; 1 Dan. Ch. Pr. (4th Am. ed.) 230, 231.

(*q*) *M'Namara v. Williams*, 6 Ves. 143.

(*r*) *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192.

(*s*) *Clay v. Sharpe*, 18 Ves. 346, note; *Corder v. Morgan*, 18 Ves. 344.

(*t*) *Tasker v. Small*, 3 Myl. & Cr. 63; *Long v. Bowling*, 33 Beav. 585.

(*u*) *Peacock v. Penson*, 11 Beav. 355, 359.

(*v*) *Delabere v. Norwood*, 3 Swanst. 144; *Petre v. Duncombe*, 7 Hare, 24; 1 Sugden V. & P. 232; but see *Collett v. Hover*, 1 Coll. 227; and see, as to multifariousness, *Inman v. Wearing*, 3 De G. & S. 732, and cases cited.

[sale in two lots of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should be a party to the assignment of the other lot, for the purpose of entering into the covenants by way of indemnity usual in such cases, it was held, that the purchaser of lot 2 was not a necessary party to the vendor's bill for specific performance of the purchase of lot 1. (*w*) So, where a land-owner agreed to sell land to a railway company, and to buy up his tenant's interest, it was held that the tenant was not a necessary party to the vendor's bill for specific performance and to restrain trespass by the company. (*x*) But in a suit not merely for specific performance, but also for recovery of the possession, the party actually in possession, although no party to the contract, may properly be made a defendant. (*y*) So, too, a stranger to the contract may, by intermeddling in it, — as, *e. g.* by claiming an interest in the purchase-money, — make himself a proper party to a suit for specific performance. (*z*)

bound to join in conveyance, not a necessary party to vendor's bill.

Persons having rights adverse to, or inconsistent with, those of the vendor, or having no rights in the subject-matter of the suit, ought not to be joined with him as co-plaintiffs; (*a*) and if, being infants, they were so joined in respect of adverse or inconsistent rights, the court would, before the 15 & 16 Vict. c. 86, have refused to make a decree, even by consent; (*b*) nor, as a general rule, can parties claiming such rights be made defendants to the purchaser's bill; (*c*) but they may, it would appear (and this seems to form an exception to the above general rule), be made defendants to the vendor's bill; (*d*) and

Persons having adverse, inconsistent, or no rights, cannot join the vendor as co-plaintiffs;

but may be made defendants, *semble*.

(*w*) *Patterson v. Long*, 5 Beav. 186.

(*x*) *Robertson v. Great Western Railway Co.* 10 Sim. 314 c.

(*y*) *Bishop of Winchester v. Mid-Hants Railway Co.* L. R. 5 Eq. 17.

(*z*) *West Midland Railway Co. v. Nixon*, 1 H. & M. 176.

(*a*) See *Fulham v. M'Carthy*, 1 H. L. Cas. 703; *Padwick v. Platt*, 11 Beav. 503.

(*b*) See *Wood v. White*, 4 Myl. & Cr. 483.

(*c*) *Tasker v. Small*, 3 Myl. & Cr. 63; *De Hoghton v. Money*, L. R. 2 Ch. Ap. 164, 170; but see, and consider, *West Midland Railway Co. v. Nixon*, 1 H. & M.

176; *Daking v. Whimper*, 26 Beav. 568;

Fenwick v. Bulman, L. R. 9 Eq. 165, V.

C. S. In *Carter v. Mills*, 30 Miss. (9

Jones) 432, which was a suit for specific performance of a contract to convey land,

it was held that a person not made a party, who claims a superior title to the land in question under the party of whom performance is sought, may come in and assert his rights; as a decree might affect them injuriously by casting a cloud upon his title.

(*d*) See *Calv. on Part.* 329; *Evans v. Jackson*, 8 Sim. 217; *Sanders v. Richards*, 2 Coll. 568; and see *Lord Langdale's re-*

[the court has, by *consent*, made a decree in a suit for specific performance by several purchasers at the same sale. (*e*)

However, where, at a sale by auction, it was arranged that a portion of lot A. should be sold as part of lot B., it was, on a bill filed by the purchaser of lot A. for specific performance according to the particulars, held, that the purchasers of lot B. were necessary parties; upon the special ground that the vendor ought not to remain exposed to another suit by the purchaser of lot B. for specific performance according to the arrangement at the sale. (*f*)

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in any suit for specific performance by the principal; inasmuch as the performance of the covenant with the principal would be no defence to an action at law by the agent. (*g*)

Generally, however, the contract is not under seal; but, even then, if the agency be not apparent on the contract, the original contractor should (unless the plaintiff can prove the agency) be made a party to the suit, as a defendant, (*h*) in order to bind his apparent interest; (*i*) and, although an action at law might in such case be maintained by either agent or principal, if a bill be filed, the parties beneficially interested in the contract must be the parties to the suit. (*k*) So, an auctioneer is frequently made a co-plaintiff with the vendor, upon the ground either of his having an interest in the contract, or of his liability to

Purchasers of one lot, when necessary party to suit in respect of another lot.

Agent must be party, if contract under seal.

When to be made party, if contract not under seal.

Auctioneer, when and why made party.

marks as to the judgment creditors, in *Lord Leigh v. Lord Ashburton*, 11 Beav. 474.

(*e*) *Hargreaves v. Wright*, 10 Hare Ap. 56.

(*f*) *Mason v. Franklin*, 1 Yo. & Col. C. C. 239. In general, purchasers of different lots cannot be joined as co-defendants; *Rayner v. Julian*, 2 Dick. 177; *Brookes v. Lord Whitworth*, 1 Mad. 86; 1 Dan. Ch. Pr. (4th Am. ed.) 335, 344. But where an administrator had collusively sold separate lots to separate purchasers at the same sale, a bill against all the purchasers was held not to be multifarious. *Forniquet v. Forstall*, 34 Miss. 87.

(*g*) See *Cooke v. Cooke*, 2 Vern. 36; *Cope v. Parry*, 2 Jac. & W. 538; 1 Dan. Ch. Pr. (4th Am. ed.) 195.

(*h*) See, and consider, *Fulham v. M'Carthy*, 1 H. L. Cas. 703; *Chadwick v. Maden*, 9 Hare, 188.

(*i*) 1 Dan. Ch. Pr. (4th Am. ed.) 196; *Taylor v. Lomson*, 4 Myl. & Cr. 134; and see *Nelthorpe v. Holgate*, 1 Coll. 217, 218; where it was held that an agent might join as co-plaintiff.

(*k*) *Small v. Attwood*, 1 You. 457; the words "suit" and "contract," in lines 10 and 11, should evidently be transposed.

[an action for the deposit. (*l*) But if the agent has no interest in the contract or the subject-matter thereof, and is under no liability in respect of the contract, he is an improper party to the suit; (*m*) and it seems probable that he ought not, at least as a defendant, to be made a party in respect of his supposed liability to pay damages or restore the deposit. (*n*)

Agent when an improper party.

If the vendor die before completion, his personal representatives, as being entitled to the purchase-money, are *primâ facie* the proper plaintiffs. If the personal estate has been vested in trustees, under an order of the court, and a bill is filed by such trustees, the personal representative is still a necessary party; (*o*) and unless the plaintiffs have power to convey the vendor's interest in the estate, (*p*) the person in whom the same is vested, or who has power to convey it, must also be made a party; (*q*) but if there are devisees, or if the executors are empowered to sell, the heir is said to be an unnecessary party, (*r*) as the purchaser has no right to insist on proof of the will against the heir; (*s*) or to require his concurrence; (*t*) unless it is conceived, there is reasonable ground for disputing the validity of the will. If the vendor have devised the estate in strict settlement, the trustees, the persons (if any) in whom the first estate of inheritance is vested, (*u*) and the intermediate tenants for life, (*v*) and the owners (if ascertained) of any intermediate, contingent, or executory estates, (*w*) must be made parties.

Death of vendor, who then entitled to sue purchaser, and who proper parties to suit.

Heir, when unnecessary party.

(*l*) 1 Dan. Ch. Pr. (4th Am. ed.) 195, 196.

(*m*) King of Spain v. Machado, 4 Russ. 225, 240; Kingsley v. Young, cited 1 Dan. Ch. Pr. (4th Am. ed.) 296.

(*n*) See Kendall v. Beckett, 2 Russ. & M. 90; Sainsbury v. Jones, 5 Myl. & Cr. 1, 4; Aberaman Iron Works v. Wickens, L. R. 5 Eq. 514; S. C. L. R. 4 Ch. Ap. 101.

(*o*) See Cave v. Cork, 2 Yo. & Col. C. C. 130, 133.

(*p*) *I. e.* the estate, whether legal or merely equitable, which the vendor held subject to the contract. See Roberts v. Marchant, 1 Hare, 547.

(*q*) Roberts v. Marchant, 1 Hare, 547; Fowler v. Lightburn, 11 Ir. Ch. R. 495; Story Eq. Pl. §§ 160, 177; Morgan v. Morgan, 2 Wheat. 298.

(*r*) See Calv. on Part. 327.

(*s*) Colton v. Davis, 3 P. Wms. 192; Bellamy v. Liversidge, 1 Sugden V. & P. (8th Am. ed.) 439; Boyse v. Lord Rossborough, Kay, 71; 3 De G., M. & G. 817; 6 H. L. Cas. 2.

(*t*) M'Culloch v. Gregory, 3 K. & Jo. 12.

(*u*) Hopkins v. Hopkins, 1 Atk. 590.

(*v*) Gore v. Stackpoole, 1 Dow, 18, 31.

(*w*) 1 Dan. Ch. Pr. (4th Am. ed.) 265, 226.

Who, in such a case, proper parties to purchaser's bill.

[So, the personal representatives of the vendor, and the persons, who have power to convey his estate, are the proper parties to a purchaser's bill. (x)]

- So, if the vendor have, by act *inter vivos*, assigned his interest under the contract, he — or if he be dead, his personal representative — must be a party to the assignee's bill as defendant; or, if such interest be recoverable *at law*, either as defendant or as co-plaintiff. (y) So, if subsequently to the contract the vendor have aliened or incumbered the estates contracted for, the weight of authority seems to show that the alienees or incumbrancers, if they took with notice of the contract, may be made defendants to the purchaser's bill. (z)

Alienation of vendor's interest by act *inter vivos*; who proper parties to suit against or by purchaser.

Cestuis que trust, when unnecessary parties.

When the estate is vested in trustees in trust to sell, and pay the proceeds to specified persons with power to give receipts, the *cestuis que trust* are not necessary parties to the suit. (a)

Death of purchaser; who entitled to sue vendor, and who proper parties to suit;

If the purchaser die before completion, his heir, or devisee (if the estate be one of inheritance), is the party entitled to sue for specific performance, making the personal representatives parties, if he seek payment of the purchase-money out of the personal estate; (b) so, on a bill filed by the vendor, the heir or devisee of the purchaser

(x) See *Calv. on Part.* 327.

(y) See *Fulham v. McCarthy*, 1 H. L. Cas. 703, 722; *Ryan v. Anderson*, 3 Madd. 174; *Padwick v. Platt*, 11 Beav. 503.

(z) See *Daniels v. Davidson*, 16 Ves. 249; *Echcliff v. Baldwin*, 16 Ves. 267; *Spence v. Hogg*, 1 Coll. 225; *Collett v. Hover*, 1 Coll. 227; *Potter v. Sanders*, 6 Hare, 1; *Shaw v. Thackray*, 1 Sm. & G. 537; but see, *contra*, *Cutts v. Thodey*, 1 Coll. 223; *Lenty v. Hillas*, 2 De G. & J. 110. Where the vendor enters into a new contract for the sale of the same estate, the second vendee is a necessary party defendant in a suit to enforce specific performance of the first contract. *Fullerton v. McCurdy*, 4 Lansing, 132. See *Buttrick v. Holden*, 13 Met. 255; *ante*, 1436, note (b); *Clark v. Flint*, 22 Pick. 231. Every subsequent purchaser from either the vendor or purchaser, with notice, be-

comes liable to the same equities as the party would be from whom he purchased. 1 Story Eq. Jur. § 789; *Champion v. Brown*, 6 John. Ch. 398, 403; *Muldrow v. Muldrow*, 2 Dana, 387; *Hampton v. Edelen*, 2 Harr. & J. 64; *Hoagland v. Latourette*, 1 Green Ch. 254; *Langdon v. Woolfolk*, 2 B. Mon. 105. The assignee of the vendor may have an equity for specific performance, by a bill in which the purchaser and vendor may be made parties defendants: the purchaser to pay and the vendor to convey to the purchaser upon such payment. *Hanna v. Wilson*, 3 Grat. 243; see decree in this case.

(a) *Wakeman v. Duchess of Rutland*, 3 Ves. 233; *Binks v. Lord Rokeby*, 2 Madd. 227; *Potts v. Thames Haven Co.* 15 Jur. 1004, V. C. P.

(b) *Broome v. Monk*, 10 Ves. 597; *Buckmaster v. Harrop*, 13 Ves. 456.

[is a necessary party to the suit ; (c) so, if the bill be filed against the heir or devisee of the purchaser, the personal representatives must be made parties, because the purchase-money is primarily payable out of the personal estate. (d)]

or to suit by vendor.

If the purchaser have assigned the benefit of the contract, the suit against the vendor for specific performance should, it would seem, be by the assignee, (e) making the purchaser a defendant. If, however, the purchaser merely enter into an ordinary agreement for a sub-sale, agreeing himself to convey the estate, and not that the original vendor shall convey it, the sub-purchaser is not, in general, a necessary or proper party to a suit for the performance of the original contract. (f)

Alienation of purchaser's interest by act *inter vivos* ; who proper parties to suit by or against vendor.

And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit. (g)

Purchaser not to be party if his assignee has been accepted by vendor.

5. *As to the Bill.*

If the bill state that the agreement was in writing, it need not allege signature ; (h) nor that it was duly stamped. (i) But the mere allegation of an agreement, without any statement that it was in writing, is nothing more than an allegation of a verbal agreement ; and unless from the other averments in the pleadings a written agreement must necessarily be presumed, the bill is demurrable. (k)

As to form of bill.

It need not allege signature of agreement.

(c) *Townsend v. Champernowne*, 9 Price, 130.

(d) 1 Dan. Ch. Pr. (4th Am. ed.) 285 ; *Story Eq. Pl.* § 177 ; *Cocke v. Evans*, 9 Yerger, 287.

(e) See *Fulham v. McCarthy*, 1 H. L. Cas. 703, 717 ; *Padwick v. Platt*, 11 Beav. 503 ; but see *Nelthorpe v. Holgate*, 1 Coll. 203.

(f) See *Anon. v. Walford*, 4 Russ. 372 ; *Chadwick v. Maden*, 9 Hare, 188 ; *Fenwick v. Bulman*, L. R. 9 Eq. 165.

(g) *Holden v. Hayn*, 1 Meriv. 47 ; *Hall v. Laver*, 3 Yo. & Coll. 191. See *Hemingway v. Fernandes*, 13 Sim. 228 ; *Shaw v. Fisher*, 5 De G., M. & G. 596.

(h) *Rist v. Hobson*, 1 Sim. & Stu. 543 ; *Field v. Hutchinson*, 1 Beav. 599 ; *Bark-*

worth v. Young, 4 Drew. 1 ; 1 Dan. Ch. Pr. (4th Am. ed.) 365.

(i) 1 Dan. Ch. Pr. (4th Am. ed.) 365, 366.

(k) 1 Dan. Ch. Pr. (4th Am. ed.) 365 ; *Whitchurch v. Bevis*, 2 Bro. C. C. 559 ; *Barkworth v. Young*, 4 Drew. 1 ; *Redding v. Wilkes*, 3 Bro. C. C. 400 ; *Wood v. Midgley*, 5 De G., M. & G. 41 ; *Piercy v. Adams*, 22 Geo. 109. But see *Cosine v. Graham*, 2 Paige, 177, where Chancellor Walworth says : " If the agreement, as stated in the bill, appears to be a parol agreement only, and no sufficient grounds are alleged to take the case out of the statute, the defendant may, by demurrer, object to any relief founded thereon. But, if it is stated generally, that an agreement

[Where letters are relied upon, they may be stated in the bill, either as constituting the agreement, or as evidence of a parol agreement; in the latter case, it will be necessary to prove other matter sufficient to take the case out of the statute. (*l*)

Letters, how to be referred to.

As a general rule, the bill *need* not state inferences or results of law arising from the facts alleged. It has, however, been held, that a vendor meaning to rely on the purchaser's waiver of his *prima facie* right to a marketable title, must allege or charge such waiver, and that it is not sufficient to allege facts which, if proved, would be evidence of it. (*m*) But on the other hand, it is improper to introduce general charges or averments of waiver, &c., unsupported by a statement of the particular facts. The party ought to so frame his case upon the record, that the court can fairly see what the case is which is to be relied on. (*n*)

Inferences of law, whether to be stated.

Waiver relied on should be alleged;

and facts, supporting it should be stated.

Omission to state requisite consent, held immaterial.

It has been held that a bill which shows that a specified consent is requisite to enable the plaintiff to perform the contract, but omits to state that such consent has been obtained, is not therefore demurrable. (*o*)

Where the contract is originally conditional, the performance of the condition should be alleged; so, where it purports to be signed by an agent, the fact of the agency, and the authority of the agent, should be alleged and proved; so, also, the plaintiff should state that he has performed, or been ready and willing to perform, his part of the agreement, and that there is no incapacity in the defendant to complete it. (*p*) If damages are claimed, some special injury must be shown; a mere general allegation that the plaintiff has sustained damage being insufficient. (*q*)

Where the contract is conditional, the performance of the condition should be alleged.

or contract was made, the court will presume it a legal contract until the contrary appears; and the defendant must either plead the fact, that it was not in writing, or insist upon the defence in his answer." This view is supported by other cases. See *Farnham v. Clements*, 51 Maine, 426; *Dudley v. Bachelder*, 53 Maine, 403; *Cranston v. Smith*, 6 R. I. 231; *Wood v. Midgley*, 5 De G., M. & G. 41, and note; *Richards v. Richards*, 9 Gray, 314.

(*l*) See *Birce v. Bletchley*, 6 Madd. 17; *Skinner v. M'Douall*, 2 De G. & S. 265; 1 Dan. Ch. Pr. (4th Am. ed.) 365.

(*m*) *Clive v. Beaumont*, 1 De G. & S. 397; and *Gaston v. Frankum*, 2 De G. & S. 561.

(*n*) See *Hunter v. Daniel*, 4 Hare, 432.

(*o*) *Smith v. Capron*, 7 Hare, 185.

(*p*) *Columbine v. Chichester*, 2 Phil. 27.

(*q*) See *Chinnock v. Marchioness of Ely*, 2 H. & M. 220.

[The plaintiff cannot, under the prayer for general relief, obtain a decree inconsistent with either the specific case made, or the specific relief prayed by the bill. (*r*) For instance, a vendor who, through want of title, fails to obtain a decree for specific performance against a purchaser in possession cannot, under the prayer for general relief, obtain an account of rents and profits, although the defendant by his answer state his readiness to pay a fair rent; (*s*) nor, where he fails in proving the agreement alleged by his bill, can he, in general, take a decree for performance of a different agreement admitted by the defendant's answer; (*t*) nor can he, under the general prayer, obtain relief, which, although consistent with the specific relief, is yet sustained only by allegations which have been introduced merely as showing his right to the specific relief; (*u*) and, in general, where a bill is filed making a case of actual fraud, (*v*) the right to relief being rested on that ground, and such fraud is disproved or not established, the court will not allow the bill to be used for any secondary purpose, but will dismiss it with costs; (*w*) unless it allege other matter on which the court can ground a decree.]

Prayer for general relief, what relief; can be obtained under.

7. *As to how the Plaintiff's Case may be sustained in the Absence of a Written Agreement; Fraud; Part Performance; Admission by Defendant of Parol Agreement; Parol Variation of Written Agreement.*

As to how plaintiff's case may be sustained, &c.

Although in general there must, in order to sustain a suit for specific performance, be a contract in writing within the statute of frauds, the court, in certain cases, decrees specific performance of a parol agreement, upon the ground, 1st, of fraud having been the cause of the non-compliance with the requisitions of the statute; 2dly, of the

Written agreement when dispensed with;

on ground of fraud;

(*r*) *Hiern v. Mill*, 13 Ves. 119; *Cockerell v. Dickens*, 1 M. D. & D. G. 45, 81, Priv. C.; *Hill v. Great Northern Railway Co.* 5 De G., M. & G. 72; *White v. Cud-* 1 5.
don, 8 Cl. & Fin. 766; *Cuddon v. Tite*, 1 Giff. 395.

(*s*) *Williams v. Shaw*, 3 Russ. 178, note.

(*t*) *Legol v. Miller*, 2 Ves. sen. 299; but see *Mortimer v. Orchard*, 2 Ves. jr. 243; *Jeffery v. Stephens*, 8 Jur. N. S. 947; *Hanbury v. Litchfield*, 2 Myl. & K. 629.

(*u*) *Stephens v. Guppy*, 3 Russ. 171, 185.

(*v*) See *M'Calmont v. Rankin*, 8 Hare, 1 5.

(*w*) *Glasscott v. Lang*, 2 Phil. 310, 322; and see *Wilde v. Gibson*, 1 H. L. Cas. 621; *Ferraby v. Hobson*, 2 Phil. 255, and *Maguire v. O'Reilly*, 3 J. & L. 224, 240; *Price v. Berrington*, 3 Mac. & G. 486, 498; *Curson v. Belworthy*, 3 H. L. Cas. 742.

parol performance, or defendant's admission. [parol agreement having been in part performed; or, 3dly, of its existence being admitted by the defendant. (x)]

1st. If by fraud the defendant has been prevented a compliance with the requisitions of the statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract. (y) But it is not fraud in a purchaser to decline to sign the fair copy of an agreement, which he had assented to when in draft, and had promised to sign as soon as it was fair copied. (z)

2dly. As to acts of part performance, (a) sufficient to take a case out of the statute of frauds. (b) It is, in general, of the essence of such an act, that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally

(x) As to the distinction between agreements and declarations of trusts, see *Dale v. Hamilton*, 2 Phil. 266, 275. See, too, *Smith v. Matthews*, 2 De G., F. & J. 139; 7 Jur. N. S. 378, and cases there cited. "When the court is called upon to establish or act upon a trust of lands, by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust that there is a trust; but it must also be manifested and proved by writing, signed as required, what that trust is." Per *Turner L. J.* in *Smith v. Matthews*, 3 De G., F. & J. 139.

(y) See *Whitchurch v. Bevis*, 2 Bro. C. C. 565; and note to *Pym v. Blackburn*, 5 Ves. 38, and cases there collected; and *Morse v. Merest*, 6 Madd. 26; *Lincoln v. Wright*, 4 De G. & J. 16; 1 Sugden V. & P. (8th Am. ed.) 150, 151, 174; *Jenkins v. Eldredge*, 3 Story, 181, 290-293; *Ridgway v. Wharton*, 3 De G., M. & G. 677. The law is otherwise in Mississippi. 6 H. L. Cas. 238; *Box v. Stanford*, 13 Sm. & M. 93. And in *Glass v. Hulbert*, 102 Mass. 38, *Wells J.* said: "In our opinion this doctrine would practically annul the statute."

(z) *Wood v. Midgley*, 8 De G., M. & G. 41.

(a) See *Attorney General v. Day*, 1 Ves. sen. 218, 221; *Taylor v. Beech*, 1 Ves. sen. 297.

(b) The ground on which courts of equity proceed in decreeing specific performance of oral contracts within the statute of frauds partly executed, is, that it would be a fraud upon the party who has acted under the agreement, if the transaction were not completed. *Hamilton v. Jones*, 3 Gill & J. 127; *Heth v. Wooldridge*, 6 Rand. 605; *Glass v. Hulbert*, 102 Mass. 35, 36; *Nye v. Taggart*, 40 Vt. 295; *Netherly v. Ripley*, 21 Texas, 434; *Merethen v. Andrews*, 44 Barb. 200; *Mason v. Blair*, 33 Ill. 194; *Chastain v. Smith*, 30 Geo. 96; 1 Sugden V. & P. (8th Am. ed.) 151, and note (b); *Green v. Finin*, 35 Conn. 178. In some of the states the courts have declined to decree specific performance of parol agreements within the statute of frauds, although there has been a part performance. 1 Sugden V. & P. (8th Am. ed.) 151, note (b), and cases cited; *Buck v. Dowley*, 16 Gray, 555, 557, 558; *Brooks v. Wheelock*, 11 Pick. 439; *Jacobs v. Peterborough & Shirley R. R. Co.* 8

[in a position different from that which, according to their legal rights, they would be in if there were no contract. (c) For instance, delivery of possession is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser ; (d) and acceptance of possession is a sufficient part performance, on the part of the purchaser, to sustain his suit against the vendor ; (e) the fact of the purchaser being, without liability to a charge of trespass, in possession of the vendor's land, is considered as showing unequivocally that some contract has taken place between the litigant parties ; (f) and the court will then receive parol evidence of the terms of such contract.

as, e. g. delivery of possession ;

Thus, where there was a parol agreement for a mortgage, and that the mortgagor should continue in the occupation of part of the property, but an absolute conveyance was taken, it was held that the retention of possession by the mortgagor after the execution of the conveyance, was a sufficient part performance to exclude the operation of the statute ; and parol evidence was admitted to prove the terms of the contract ; (g) so,

retention of possession ;

Cush. 223 ; *Wilton v. Harwood*, 23 Maine, 131 ; *Wheelan v. Sullivan*, 102 Mass. 204, 207 ; *Glass v. Hulbert*, 102 Mass. 24, 33 ; *Patton v. M'Clure*, Mart. & Yerg. 333 ; *Luckett v. Williamson*, 37 Missou. 388 ; *Allen v. Chambers*, 4 Ired. Eq. 125 ; *Ridley v. McNairy*, 2 Humph. 174 ; 1 *Sugden V. & P.* (8th Am. ed.) 151, note (b) ; *Hunt v. Roberts*, 40 Maine, 187 ; *Hainston v. Jaudon*, 42 Miss. 380.

(c) *Per V. C. W. in Dale v. Hamilton*, 5 Hare, 381.

(d) *Pyke v. Williams*, 2 Vern. 455 ; *Lacon v. Mertins*, 3 Atk. 1, 4 ; *Bowers v. Cator*, 4 Ves. 91 ; *Buckmaster v. Hartop*, 13 Ves. 456 ; *Reynolds v. Waring*, You. 351, 353 ; 1 *Sugden V. & P.* (8th Am. ed.) 151, and cases in notes (e) and (g) ; *Powell v. Lovegrove*, 8 De G., M. & G. 357 ; *Eaton v. Whitaker*, 18 Conn. 222 ; *Tilton v. Tilton*, 9 N. H. 386, 390 ; *Kidder v. Barr*, 35 N. H. 235, 255.

(e) *Clinan v. Cooke*, 1 Sch. & Lef. 41 ; *Gregory v. Mighell*, 18 Ves. 328 ; *Morphett v. Jones*, 1 Swanst. 172 ; *Surcome v. Pinniger*, 3 De G., M. & G. 571 ; *Wilson v. The West Hartlepool Railway Co.* 2 De G., J. & S. 475, 485 ; 1 *Sugden V. &*

P. (8th Am. ed.) 151, note (g) ; *Glass v. Hulbert*, 102 Mass. 28 ; *Moale v. Buchanan*, 11 Gill & J. 314. "The rule seems to be that no part performance, by the party sought to be charged, will take an agreement out of the statute of frauds, except in those cases where the statute itself provides for such effect. It is part performance by the party seeking to enforce, and not by the other party, to which courts of equity look, in giving relief from the statute." *Glass v. Hulbert*, 102 Mass. 31, per Wells J. See *Caton v. Caton*, L. R. 1 Ch. Ap. 137 ; S. C. L. R. 2 H. L. 127 ; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167 ; *Luckett v. Williamson*, 37 Missou. 388 ; *Hawkins v. Hunt*, 14 Ill. 42 ; *Maryland Savings Bank v. Schroeder*, 8 Gill & J. 94 ; but see *Wilson v. West Hartlepool Railway Co.* 2 De G., J. & S. 485, 492, 493 ; *Pugh v. Good*, 3 Watts & S. 56.

(f) *Per V. C. W. in Dale v. Hamilton*, 5 Hare, 381 ; *Wilson v. West Hartlepool Railway Co.* 34 Beav. 187 ; 2 De G., J. & S. 475 ; *Ham v. Goodrich*, 33 N. H. 45 ; 1 *Sugden V. & P.* (8th Am. ed.) 151, note (h).

(g) *Lincoln v. Wright*, 4 De G. & J.

[the execution by a tenant, who was let into possession, of certain repairs pursuant to a parol agreement for a lease, has been held sufficient; (*h*) so, the retention of possession by a tenant after the determination of the original tenancy, may, under special circumstances, amount to part performance; (*i*) so, if a tenant in possession lay out money on the premises in faith of the parol agreement, (*k*) or, it is conceived, commit acts which would (if he were merely tenant) subject him to the loss of his lease, (*l*) or to proceedings on the part of his landlord; (*m*) so, it has been held, that the mere payment of additional rent entitles the tenant to an answer from the landlord as to the existence of an agreement for a renewed lease, although the court intimate an opinion against the admissibility of parol evidence in opposition to the answer. (*n*) And, in a recent case, where his landlord verbally agreed with a yearly tenant to grant him a lease at an increased rent, with an option of purchasing the fee, the mere payment of the additional rent was held, after the landlord's death, to be a sufficient part performance to take the case out of the statute. (*o*)

In one case, it appears to have been doubted by Knight Bruce L. J., whether a retention of possession by the tenant after a parol agreement, could be such a part performance as to exclude a defence founded on the statute; (*p*) but the later cases have extended the doctrine; and it is now well settled that if the acts relied on are sufficient for the purpose, and are such as can only be referred to the parol agreement, the mere circumstance, that the tenant was already in occupation of the property, is not material. (*q*) It is, of course,

Except where the acts relied upon are referable to the preëxisting tenancy.

A m. ed.) 16, and note (2), and cases cited; 1 Sugden V. & P. (8th Am. ed.) 152, and note (*m*¹).

(*h*) *Shillaber v. Jarvis*, 8 De G., M. & G. 79; and see *Powell v. Lovegrove*, 8 De G., M. & G. 357; 1 Sugden V. & P. (8th Am. ed.) 152, and note (*m*¹).

(*i*) *Dowell v. Dew*, 1 Yo. & Col. C. C. 345; 1 Sugden V. & P. (8th Am. ed.) 152.

(*k*) *Wills v. Stradling*, 3 Ves. 382; *Ex parte Hooper*, 19 Ves. 479; *Lester v. Foxcroft*, 1 Coll. P. C. 108; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Sutherland v. Briggs*, 1 Hare, 26; *Pearson v. East*, 36 Ind. 29-32.

(*l*) See, and consider, *Parker v. Smith*, 1 Coll. 608.

(*m*) See *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Ham v. Goodrich*, 33 N. H. 45.

(*n*) *Wills v. Stradling*, 3 Ves. 378, 382.

(*o*) *Nunn v. Fabian*, L. R. 1 Ch. Ap. 35. In this case a written receipt was given by the landlord for a quarter's rent, at the increased rate.

(*p*) *Pain v. Coombs*, 1 De G. & J. 34, 46.

(*q*) *Nunn v. Fabian*, L. R. 1 Ch. Ap. 35; 1 Sugden V. & P. (8th Am. ed.) 152, and note (*l*¹).

[open for the vendor to show that the acts of part performance are properly referable to the preëxisting tenancy. (*r*)

And where the parties have for many years acted upon the assumption that a contract existed, acts which might not in themselves, and irrespectively of the lapse of time, have been sufficient to take the case out of the statute, have been held to have that effect. (*s*)

But there can be no part performance of an incomplete contract; (*t*) and an act which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not, in general, sufficient to take the case out of the statute; (*u*) *e. g.* delivery of the abstract, or giving directions for the conveyance, is insufficient; (*v*) so, also, is payment of a sum alleged to be part or even all of the purchase-money; (*w*) or procuring, and paying a valuable consideration for, a release by a third party; (*x*) or the mere retention of possession by a tenant, after the determination of his tenancy but before

What acts
are insuffi-
cient.

(*r*) A possession which can be referred to a title distinct from the agreement, will not take a case out of the statute. 1 Sugden V. & P. (8th Am. ed.) 152; Jacobs v. Peterborough & Shirley R. R. Co. 8 Cush. 224; Byrne v. Romaine, 2 Edw. Ch. 445, 446; German v. Machin, 6 Paige, 289, 293; Armstrong v. Kattenhorn, 11 Ohio, 265; Knoll v. Harvey, 19 Wisc. 99; Spalding v. Conzelman, 3 Mis. 177; Johnston v. Glancy, 4 Blackf. 94, 95; Mahana v. Blunt, 20 Iowa, 142; Hunt v. Coe, 15 Iowa, 197.

(*s*) Blackford v. Kirkpatrick, 6 Beav. 232.

(*t*) Lady Thynne v. Earl Glengall, 2 H. L. Cas. 131, 158; and see Parker v. Smith, 1 Coll. 623.

(*u*) Dale v. Hamilton, 5 Hare, 381; and see Gunter v. Halsey, Amb. 586; Lacon v. Mertins, 3 Atk. 4; *Ex parte* Hooper, 19 Ves. 479.

(*v*) Whaléy v. Bagnel, 1 Bro. P. C. 345; Cole v. White, 1 Bro. C. C. 409 (cited); Redding v. Wilkes, 3 Bro. C. C. 400; Whitchurch v. Bevis, 2 Bro. C. C. 559; Clerk v. Wright, 1 Atk. 12; Bowdes v. Amherst, Prec. Ch. 402; Cooke v. Tombs, 2 Anst. 425; 1 Sugden V. & P.

(8th Am. ed.) 140, 151, cases in notes (*d*) and (*d*¹).

(*w*) Clinan v. Cooke, 1 Sch. & Lef. 40; Watt v. Evans, 4 Y. & C. 579; Hughes v. Morris, 2 De G., M. & G. 356; Thompson v. Gould, 20 Pick. 134, 138; Dale v. Hamilton, 5 Hare, 381; Stroughill v. Gulliver, 2 Jur. N. S. 700; Allen's Estate, 1 Watts & S. 383; Purcell v. Miner, 4 Wallace, 513; Glass v. Hulbert, 102 Mass. 28; 1 Sugden V. & P. (8th Am. ed.) 152, and note (*n*), 153; Underhill v. Allen, 18 Ark. 468; 4 Kent, 451; Kidder v. Barr, 35 N. H. 235; Sanborn v. Sanborn, 7 Gray, 146; Eaton v. Whitaker, 18 Conn. 222; Lefferson v. Dallas, 20 Ohio St. 74. A party is entitled to specific performance where repayment of his money will not restore him to his former situation. Malins v. Brown, 4 Comst. 403; Everts v. Agnes, 4 Wisc. 343; Johnson v. Hubbell, 2 Stockt. (N. J.) 332. So, where the consideration has been paid in services, the value of which cannot be estimated. 4 Kent, 451, note (*g*); Rhodes v. Rhodes, 3 Sandf. 279. See Fairbrother v. Shaw, 4 Iowa, 570; Olive v. Dougherty, 3 Iowa, 371.

(*x*) O'Reilly v. Thompson, 2 Cox, 271.

[notice to quit; (*y*) or an expenditure by a tenant to which he is liable under the terms of his lease; (*z*) so, possession obtained wrongfully by the plaintiff, of course cannot avail him. (*a*)

In one case, it was laid down by Lord Westbury that where the contract is executory in this sense, viz. that the ownership of the property is transferred, subject to the payment of the purchase-money by instalments, the payment of each instalment is an act of part performance, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate. (*b*)

Where A. removed his place of business to a house belonging to B., his father-in-law, upon the faith of an alleged parol promise that he should occupy it, rent free, for his life, it was held, in a suit to restrain an action of ejectment, that the change of residence was an insufficient consideration to support the parol agreement; and that A. had no lien for money, which during the period of his occupation he had expended in ordinary repairs. (*c*)

Marriage. Marriage is not, for the purpose of specific performance, considered as a part performance of a parol contract, for which it forms the consideration. (*d*)

But where there is a written agreement after, in pursuance of a parol agreement before marriage, or where, after the marriage, possession of property is given up, or some other act is done, in pursuance of the parol agreement, which independently of the marriage, will constitute part performance, the contract may be enforced. (*e*)

Where a father by his will left his real estate to his two sons, but the will for want of due attestation, could not be admitted to

(*y*) *Wills v. Stradling*, 3 Ves. 381; *Taylor v. Beech*, 1 Ves. sen. 298; *Las-sence v. Tierney*, 1 Mac. & G. 572; *Gold-icutt v. Townsend*, 28 Beav. 445; *De Biel*

(*z*) *Frame v. Dawson*, 14 Ves. 386; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; 1 Sug-den V. & P. (8th Am. ed.) 151, note (*h*). *Jones*, 23 Beav. 469; *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76; *Caton v. Caton*, L. R. 1 Ch. Ap. 137; L. R. 2 E. & Ir. App. 127.

(*a*) *Cole v. White*, 1 Bro. C. C. 407; 1 Sugden V. & P. (8th Am. ed.) 151, and note (*h*). (*e*) *Surcome v. Pinniger*, 3 De G., M. &

(*b*) *Rose v. Watson*, 10 H. L. Cas. 672. *G. 571*; *Barkworth v. Young*, 4 Drew. 1;

(*c*) *Millard v. Harvey*, 10 Jur. N. S. 1167. *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Walford v. Gray*, 11 Jur. N. S. 106;

(*d*) *Spurgeon v. Collier*, 1 Edw. 55; *Mansel v. White*, 4 H. L. Cas. 1055.

[probate, and the elder son, who inherited the estate, told his brother on several occasions, that the property should be "not mine, nor thine, but ours," and it was accordingly held by them as tenants in common for nearly twenty years; the court considered this to be sufficient proof of a family arrangement, enforceable against the elder brother. (*f*)

As to a parol family arrangement.

In the case of a power of sale, the parol contract of a tenant for life followed by expenditure, would, it is conceived, be insufficient to bind a remainder-man who had not acquiesced in such expenditure; (*g*) for the plaintiff's contention, in cases of part performance, is, that it is a fraud on a party permitting an expenditure on the faith of a parol agreement, to attempt to take advantage of its not being in writing. (*h*)

Case of sale under a power, remainder-man not bound.

It seems to be clear upon the modern authorities (*i*) that the court being satisfied of the existence of an agreement, will, if possible, ascertain the real terms. Lord St. Leonards, however, remarks, that "the prevailing opinion requires the party seeking specific performance in such a case to show the distinct terms and nature of the contract;" (*k*) but it is not necessary to prove terms of an agreement which are immaterial, although they are stated in the bill. (*l*)

Plaintiff, how far bound to show precise terms of contract.

Where a parol agreement is sought to be specifically enforced, on the ground of part performance, it must be distinctly shown what the terms of the agreement, which has been partly performed, are, and that the acts of part performance are referable to that agreement alone. (*m*)

It must be shown that the acts of part performance are solely referable to the agreement;

(*f*) *Williams v. Williams*, 2 Dru. & S. 378; L. R. 2 Ch. Ap. 294.

5 Myl. & Cr. 167, 177; 1 Sugden V. & P. 148.

(*g*) *Blore v. Sutton*, 3 Meriv. 247; *Morgan v. Milman*, 3 De G., M. & G. 33.

(*k*) 1 Sugden V. & P. (8th Am. ed.) 155, and note (*f*); *Mortal v. Lyons*, 8

(*h*) *Blore v. Sutton*, 3 Meriv. 246. See *Powell v. Thomas*, 6 Hare, 300; *Duke of Devon v. Elgin*, 14 Beav. 530; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Meynell v. Surtees*, 1 Jur. N. S. 80, 742.

Ir. Ch. Rep. 112; *Rice v. O'Connor*, 11 Ir. Ch. Rep. 510; *Waters v. Howard*, 8 Gill, 277; *McGibbeny v. Burmaster*, 53 Penn. St. 332; *German v. Machin*, 6 Paige, 288; *Price v. Assheton*, 1 You. & Col. 441; *Savage v. Carroll*, 1 Bal. & B. 283, 550, 551.

(*i*) See *Allen v. Bower*, 3 Bro. C. C. 149; *Clinan v. Cooke*, 1 Sch. & Lef. 38; *Boardman v. Mostyn*, 6 Ves. 467, 471; *Morphett v. Jones*, 1 Swanst. 172; *Price v. Assheton*, 1 You. & Col. 82; *Dale v. Hamilton*, 5 Hare, 381; *Mundy v. Jolliffe*,

(*l*) See *Gregory v. Mighell*, 18 Ves. 328; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, 176.

(*m*) In order that an act of part performance may have any operation whatso-

[But, although the court will endeavor to put a reasonable interpretation upon vague expressions, (*n*) and in construing them, will consider the surrounding circumstances, and the conduct of the parties in their dealings with the subject-matter of the contract; (*o*) yet if the final result of all the evidence which can be procured, is to leave the material terms of the agreement doubtful, it can, of course, make no decree. (*p*)

Thus, where it remained uncertain whether the purchase-money did or did not include the timber, the court declined to interfere; (*q*) so, where an agreement for a lease did not state the length of the term to be granted, (*r*) or the date at which it was to commence, (*s*) or at which an increased rent was to become payable; (*t*) so, where on a contract for a lease for lives the lives were not named, nor the person who was to name them; (*u*) so, where the construction of the agreement depended upon the meaning of an “&c.”; (*v*) so, where the agreement was to take a lease of a

ever, it must be shown plainly what the terms of the agreement are; and it must clearly appear that the act of part performance relied upon is properly referable to an agreement such as the one alleged, and is not referable to another title. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged to have been made. *Fry Specif. Perf.* 174; *Kerr F. & M.* (18th Am. ed.) 135, 136; *Jervis v. Smith*, 1 Hoff. Ch. Rep. 470; *Phillips v. Thompson*, 1 John. Ch. 131; *Lord v. Underdunk*, 1 Sandf. Ch. 46; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Hall v. Hall*, 1 Gill, 383; 1 Story Eq. Jur. §§ 763, 764; 1 *Sugden V. & P.* (8th Am. ed.) 154, 155, and cases in notes (*e*¹) and (*f*¹); per Lord Romilly in *Price v. Salusbury*, 32 Beav. 446, 449, 461.

(*n*) *Sanderson v. Cockermonth Railway Co.* 11 Beav. 497; *Richardson v. Eyton*, 2 De G., M. & G. 79; 1 *Sugden V. & P.* (8th Am. ed.) 213, and note (*s*).

(*o*) See *Oxford v. Provand*, L. R. 2 P. C. 135; 1 *Sugden V. & P.* (8th Am. ed.)

169, and note (*y*), and cases there cited, 170.

(*p*) See 1 *Sugden V. & P.* (8th Am. ed.) 134, and notes (*o*¹) and (*q*); *Newton v. Swazey*, 8 N. H. 13; *Wright v. Puckett*, 22 Grattan, 370; *Soles v. Hickman*, 20 Penn. St. 180; *Dodd v. Seymour*, 21 Conn. 476; *Stoddert v. Bowie*, 5 Md. 18; *Colson v. Thompson*, 2 Wheat. 336; *King v. Thompson*, 9 Peters, 204; *Gill v. McAttee*, 2 Md. Ch. 255; *Boston & Maine R. R. v. Babcock*, 3 Cush. 228.

(*q*) *Reynolds v. Waring*, You. 346. See *Monro v. Taylor*, 8 Hare, 51; 3 Mac. & G. 713.

(*r*) *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(*s*) *Blore v. Sutton*, 3 Meriv. 237.

(*t*) *Lord Ormond v. Anderson*, 2 Bal. & B. 363.

(*u*) *Wheeler v. D'Esterre*, 2 Dow, 359; but see *Fitzgerald v. Vicars*, 2 Dru. & Wal. 298.

(*v*) *Price v. Griffith*, 1 De G., M. & G. 80; and see *Tatham v. Platt*, 9 Hare, 660; *Stuart v. L. & N. W. Railway Co.* 1 De G., M. & G. 721; but see *Hayward v. Cope*, 22 Beav. 140; *Parker v. Taswell*, 2 De G. & J. 559; *Cooper v. Hood*, 26 Beav. 293.

[house if the drawing-rooms were "handsomely decorated according to the present style;" (*w*) so, in the absence of special circumstances, the court will not enforce specific performance of a contract for the sale of land, which is silent as to the means of access to it, when it is reasonably uncertain whether a permanent right of way can be conferred on the purchaser. (*x*)

And it appears that, as a general rule, the plaintiff cannot rely upon any act by the defendant which can merely tend to his own prejudice, and not affect the plaintiff; *e. g.* payment of auction duty by the purchaser; (*y*) or the execution and registration by the vendor of the conveyance. (*z*) Nor, in the case of a purchase of separate lots under separate parol contracts, does part performance as to one lot set up the agreement as to another lot. (*a*)

Act by the defendant, merely to his own prejudice, no part performance; nor does part performance as to one lot affect another lot.

We may here remark that sales by auction, (*b*) and in bankruptcy, (*c*) are both within the statute of frauds.

Sales by auction and in bankruptcy within statute.

3d. Where the defendant, by his answer, admits the agreement as alleged in the bill, and does not claim the benefit of the statute, equity will decree specific performance against himself, or, if he die before decree, against his representatives. (*d*) So, if he admit a different agreement from that alleged in the bill, the plaintiff may amend the bill and take the benefit of the admission; (*e*) but, in

Admission of agreement by defendant, and statute not insisted on.

(*w*) *Taylor v. Portington*, 7 De G., M. & G. 388; but see *Samuda v. Lawford*, 8 Jur. N. S. 739.

(*x*) *Denne v. Light*, 3 Jur. N. S. 627; 8 De G., M. & G. 774. For other cases of agreements, the terms of which have been held too uncertain to be expressed, see 1 *Sugden V. & P.* (8th Am. ed.) 134, and notes (*g*) and (*r*); *Whelan v. Sullivan*, 102 Mass. 204; *King v. Ruckman*, 5 C. E. Green, 316, 359; *S. C. 6 C. E. Green*, 599; *Farwell v. Mather*, 10 Allen, 324; *Murdock v. Anderson*, 4 Jones Eq. 77; *Cox v. Middleton*, 2 Drew. 209; *Davis v. Jones*, 25 L. J. N. S. C. P. 91; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Hammer v. McEldowney*, 46 Penn. St. 334; *Morton v. Dean*, 13 Met. 385.

(*y*) *Buckmaster v. Harrop*, 13 Ves. 465.

(*z*) *Hawkins v. Holmes*, 1 P. Wms. 770.

(*a*) *Buckmaster v. Harrop*, 13 Ves. 456, 474; *Glass v. Hulbert*, 102 Mass. 28, 29; 1 *Sugden V. & P.* (8th Am. ed.) 154, and note (*d*).

(*b*) *Buckmaster v. Harrop*, 13 Ves. 456; *Blagden v. Bradbear*, 12 Ves. 466; 1 *Sugden V. & P.* (8th Am. ed.) 42, and note (*y*¹), 148, and note (*b*).

(*c*) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(*d*) See *Gunter v. Halsey*, Amb. 586; *Attorney General v. Day*, 1 Ves. 221; 1 *Sugden V. & P.* (8th Am. ed.) 149, and cases in note (*k*); see *Parker v. Smith*, 1 Coll. 615; *Ridgway v. Wharton*, 3 De G., M. & G. 677.

(*e*) *Lindsay v. Lynch*, 2 Sch. & Lef. 9;

[any case, the latter, if relying on the admission, is bound by its terms, and cannot vary them by parol evidence. (*f*) So, if the defendant, although admitting the agreement, insist upon the statute, no decree can be made against him; (*g*) but he cannot, after having admitted and submitted to perform the agreement, claim the benefit of the statute by his answer to an amended bill; (*h*) nor can he unite a plea of the statute with any other defence by answer. (*i*) It has been held that the defendant, denying the agreement, but omitting to claim the benefit of the statute by his answer, was not entitled to avail himself of it; (*k*) but this has been overruled by a later decision; (*l*) and where no answer is required, the defendant may, it seems, plead the statute orally at the hearing. (*m*) The statute may be set up by demurrer. (*n*) In one case, where the bill averred a conveyance to the defendant as trustee for the plaintiff for a nominal consideration which had not been paid, and asked for a reconveyance, or, in the alternative, for payment of the consideration money, but there was no allegation that the trust was declared in writing, a demurrer to the bill was overruled. (*o*)

1 Dan. Ch. Pr. (4th Am. ed.) 408; Harris v. Knickerbocker, 5 Wend. 638; S. C. 1 Paige, 209; Bellows v. Stone, 14 N. H. 175.

(*f*) Pyon v. Blackburn, 3 Ves. 34

(*g*) Whitchurch v. Bevis, 2 Bro. C. C. 559; Blagden v. Bradbear, 12 Ves. 466; 1 Dan. Ch. Pr. (4th Am. ed.) 656, 657, note; Luckett v. Williamson, 37 Missou. 388; Woods v. Dike, 11 Ohio, 455; 1 Sugden V. & P. (8th Am. ed.) 149; Jackson v. Oglander, 2 H. & M. 465; Rowe v. Teed, 15 Ves. 375.

(*h*) Spurrier v. Fitzgerald, 6 Ves. 548; Skinner v. M'Douall, 2 De G. & Sm. 265; Story Eq. Pl. § 763; Cozine v. Graham, 2 Paige, 177; Ontario Bank v. Root, 3 Paige, 478; Woods v. Dike, 11 Ohio, 455; Houser v. Lamont, 55 Penn. St. 311; Vaupell v. Woodward, 2 Sandf. Ch. 143.

(*i*) Cooth v. Jackson, 6 Ves. 12.

(*k*) Skinner v. M'Douall, 2 De G. & S. 265; Baskett v. Cape, 4 De G. & S. 388; Ewing v. Gordon, 49 N. H. 456; 1 Sugden V. & P. (8th Am. ed.) 149, and note (*n*); Ridgway v. Wharton, 3 De G., M. & G. (Am. ed.) 677, and cases in note (*2*); 1 Dan. Ch. Pr. (4th Am. ed.) 556, and note

(10); Artz v. Grove, 21 Md. 456; Van Duyne v. Dreeland, 1 Beasley (N. J.), 142.

(*l*) Ridgway v. Wharton, 3 De G., M. & G. 677. If the defendant admits the agreement, but intends to rely on the statute, he must say so; but if he denies, or does not admit the agreement, the burden of proof is altogether on the plaintiff, who must prove a valid agreement capable of being enforced. Ridgway v. Wharton, *supra*, per L. C. See 6 H. L. Cas. 238; Jervis v. Smith, 1 Hoff. Ch. R. 470; Hall v. Hall, 1 Gill, 383; Winn v. Albert, 2 Md. Ch. 169; 1 Sugden, 150.

(*m*) Lincoln v. Wright, 4 De G. & J. 16; Snead v. Green, 8 Jur. N. S. 4; S. C. *nom.* Green v. Snead, 30 Beav. 231; 1 Dan. Ch. Pr. 656, 657; but see Holding v. Barton, 1 Sm. & G. App. xxv.

(*n*) Wood v. Midgley, 5 De G., M. & G. 41; Barkworth v. Young, 4 Drew. 1; Rummers v. Robins, 11 Jur. N. S. 631; 3 De G., J. & S. 88; Walter v. Locke, 5 Cush. 90, 93; Cozine v. Graham, 2 Paige, 177; Chambers v. Lecompte, 9 Mis. 566.

(*o*) Davis v. Otty, 12 W. R. 682; affirmed *Ib.* 896.

[Where a plaintiff alleges a written agreement with a parol variation in favor of the defendant, and offers to perform the agreement with the variation, the court will, of course, enforce specific performance, although the defendant insist on the statute. (*p*)

Parol variation in favor of defendant.

The plaintiff, however, as a general rule, if suing on a written contract, is bound by its terms, and cannot, upon the ground of fraud, surprise, or mistake, seek to vary, add to, or explain its contents; (*q*) except, perhaps, where the fraud consists in a refusal to accede to a promised variation, upon the faith of which the plaintiff entered into a written agreement; (*r*) or in a fraudulent preparation or alteration of the agreement so as to make it inconsistent with the real intention of the parties; and with the understanding of the plaintiff at the time he executed it; or where, by mistake, an agreement, not expressing the real intention of the parties, is entered into, and the mistake is admitted by the answer, or, not being denied by the answer, is proved by unexceptionable evidence. (*s*) A subsequent parol variation cannot be enforced by the plaintiff, (*t*) unless there have been such

Purchaser cannot, in general, enforce specific performance of written contract with parol variation.

Subsequent parol variation can only

(*p*) 1 Sugden V. & P. (8th Am. ed.) 160, and notes (*y*) and (*y*²); Fry Specif. Perf. (2d Am. ed.) 304, § 489 *et seq.*; Ramsbottom v. Gosden, 1 Ves. & Bea. 165; Flood v. Tinlay, 2 Bal. & B. 9.

(*q*) 1 Sugden V. & P. (8th Am. ed.) 160, and note (*r*), 161, note (*a*); Marquis of Townsend v. Stangroom, 6 Ves. 328; Price v. Dyer, 17 Ves. 356; Clowes v. Higginson, 1 Ves. & Bea. 524; Manser v. Back, 6 Hare, 443; Western Railroad Corp. v. Babcock, 6 Met. 346; Chappell v. Gregory, 34 Beav. 250; Swaisland v. Dearsley, 29 Beav. 430; Gillespie v. Moon, 2 John. Ch. 585; 1 Story Eq. Jur. §§ 157-161; Browne v. Sligo, 10 Ir. Ch. Rep. 1; Tucker v. Madden, 44 Maine, 200; Edmund's Appeal, 59 Penn. St. 220; Hileman v. Wright, 9 Ind. 126; Walters v. Morgan, 3 De G., F. & J. 725; Tilton v. Tilton, 9 N. H. 391-393; Smith v. Greeley, 14 N. H. 378; Blodgett v. Hobart, 18 Vt. 414; Glass v. Hulbert, 102 Mass. 24; Phyfe v. Wardell, 2 Edw. Ch. 47; Smith v. Machin, 4 Lansing 41, 45, 46; Park v. Johnson, 4 Allen, 259.

(*r*) Pember v. Mather, 1 Bro. C. C. 52, 54; 1 Sugden, 174. But see Clarke v. Grant, 14 Ves. 519, 525.

(*s*) See note to Pym v. Blackburn, 3 Ves. 38, and cases as to fraud there cited; Lord Thurlow's judgment in Lord Irnham v. Child, 1 Bro. C. C. 94; Lord Eldon's remarks, 6 Ves. 339; Sir John Leach's argument as counsel for the defendant, in Woollam v. Hearn, 7 Ves. 215; Attorney General v. Sitwell, 1 You. & Col. 583. Parol evidence even of collateral matters is inadmissible. Rich v. Jackson, 4 Bro. C. C. 514; Hare v. Shearwood, 1 Ves. jr. 246; Marquis of Townsend v. Stangroom, 6 Ves. 328. It seems to be doubtful whether a defendant falsely in his answer denying the agreement can be convicted of perjury. Rex v. Dunston, R. & M. 109; at any rate his conviction will not entitle the plaintiff to a decree. See Bartlett v. Rickersgill, 4 East, 577, note, cited 4 Burr. 2255.

(*t*) Robson v. Collins, 7 Ves. 130, 133; Nurse v. Lord Seymour, 13 Beav. 254.

be enforced if part performed. [part performance of the varied agreement as would support a decree in the case of an original independent agreement; (*u*) or (it is conceived) unless the defendant by his answer admit the variation, and do not insist on the statute.

We may here remark that a defendant, admitting by his answer that the plaintiff, at the date of the contract, was *entitled*, cannot at the hearing object that no abstract was delivered; (*v*) nor can he to a vendor's bill claim, by way of set-off, a balance due to him in respect of antecedent transactions. (*w*)

8. *As to Grounds of Defence negating Plaintiff's Right to Specific Performance, except with a Variation, of the Original Written Agreement; viz. Fraud; Mistake; Misrepresentation; Unfulfilled Promise; Parol Variation, &c.*

On the other hand, it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect; so that all parties may have the benefit of what they contracted for. (*x*)

Defence negating plaintiff's right to specific performance except with variation. The admissibility of parol evidence by way of defence to a bill for specific performance of a written agreement, in its literal, unvaried terms, may be conveniently considered with reference to four classes of cases, viz. :

1st. Cases where the defence is, that by fraud or mistake, the written agreement is, *in terms*, different from that which the defendant supposed it to be, when he executed it; this, if proved, will negative the plaintiff's right to specific performance except with a variation. (*y*)

- 1st. Fraud or mistake affecting terms of agreement.
- (*u*) See *Jordan v. Sawkins*, 1 Ves. jr. 402; *Price v. Dyer*, 17 Ves. 356; *Van v. Corpe*, 3 Myl. & K. 269, 277, and 1 Sugden, 164, and note (*m*¹).
- (*v*) *Phipps v. Child*, 3 Drew. 709.
- (*w*) *Phipps v. Child*, 3 Drew. 709.
- (*x*) Per Lord Cottenham, Cr. & Ph. 62; *Quinn v. Roath*, 37 Conn. 16; *King v. Hamilton*, 4 Peters, 311; *Kerr F. & M.* (Am. ed.) 357 *et seq.*
- (*y*) See *Joynes v. Statham*, 3 Atk. 388; *Woollam v. Hearn*, 7 Ves. 211; 1 Sugden, 157 *et seq.*, 160, and notes; *Marquis of Townsend v. Stangroom*, 6 Ves. 328; *Ramsbottom v. Gosden*, 1 Ves. & Bea. 165; *Garrard v. Grinling*, 2 Swanst. 244; *Lord Gordon v. Marquis Hertford*, 2 Madd. 106; *Clinan v. Cooke*, 1 Sch. & Lef. 38, 39; *Humphries v. Horne*, 3 Hare, 277; *Wood v. Scarth*, 1 Jur. N. Y. 1107; 2 K.

[2d. Cases where the defence is, that by fraud, mistake, or surprise, the defendant executed the written agreement under a reasonable misapprehension as to its effect as between himself and the plaintiff; here, also, the court will refuse to make a decree according to the literal terms, or strict construction of the agreement.

2d. Fraud, mistake, or surprise, inducing defendant to enter into agreement misapprehending its effect;

Thus, where the terms of the agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court has, upon that ground only, refused to enforce it; (*z*) and this, even where the defendant himself was the author of the ambiguity, and the plaintiff certainly supposed himself to be buying all he claimed. (*a*) So, where the defendant, by his answer, alleged that he made his offer, and signed a contract for the purchase of an undivided moiety of an estate, under the erroneous belief that the rental stated in the particular was that of the moiety, and not of the whole estate, and the wording of the particular justified a doubt as to its meaning, the court refused to enforce specific performance; (*b*) so, where the defendant assumed that his contract for the purchase of a dwelling-house included an adjoining yard, and the contract was so framed as to leave it doubtful whether it was included or not. (*c*) So, where the defendant made a mistake in calculating the purchase-money which he was willing to take, and offered to sell the estate for 1,250*l.* instead of 2,250*l.*, as he had intended. (*d*) So, where the written contract which the plaintiff sought to enforce, was silent

as where the terms of the agreement are ambiguous;

& Jo. 33; *Wright v. Goff*, 2 Jur. N. S. 481; *Vouillon v. States*, 2 Jur. N. S. 845; *Best v. Stow*, 2 Sandf. Ch. 298; *Honeyman v. Marryatt*, 6 H. L. Cas. 111; *Brooks v. Wheelock*, 11 Pick. 440.

(*z*) *Calverley v. Williams*, 1 Ves. jr. 210; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & Bea. 524; *V. C. Wigram's judgment*, in *Manser v. Back*, 6 Hare, 447; *The Western Railroad Com. v. Babcock*, 6 Met. 346; 1 Sugden V. & P. (8th Am. ed.) 160, and note (*r*); *Brooks v. Wheelock*, 11 Pick. 440, per *Wilde J.*; *Lee v. Kirby*, 104 Mass. 427; *Eastman v. Plumer*, 46 N. H. 464, 479; and see *Alvanley v. Kinnaird*, 2 Mac. & G. 8; *Wood v. Scarth*, 1 Jur. N. S. 1107;

2 K. & Jo. 33; *Jenkinson v. Pepys*, cited 6 Ves. 330.

(*a*) *Neap v. Abbott*, 1 C. P. Coop. 333; *Manser v. Back*, 6 Hare, 447. As to alteration of an agreement, see *Twentyman v. Barnes*, 12 Jur. 743; *V. C. K. B.*, where a plaintiff alleged that the agreement had been altered by chemical agency, and moved that the paper might be subjected to chemical tests, but the court refused the application.

(*b*) *Swaissland v. Dearsley*, 29 Beav. 430

(*c*) *Moxey v. Bigwood*, 8 Jur. N. S. 803; and see *S. C. H. L.* 10 Jur. N. S. 597; *Denny v. Hancock*, L. R. 6 Ch. Ap. 7.

(*d*) *Webster v. Cecil*, 30 Beav. 62.

[as to any restrictive conditions, extrinsic evidence was admitted to prove a prior restricted parol agreement, and specific performance of the open contract was refused. (*e*)

The principle on which the court in such cases withholds relief but mere suspicion of fraud is not a sufficient ground for relief; from the plaintiff is, that it is against conscience for a man to take advantage of the plain mistake of another; or, at least, that a court of equity will not assist him in doing so; but the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, have been held insufficient to negative the right to specific performance, — no fraud being shown; (*f*) nor will the court allow a mistake in law (*g*) to be set up as a ground for resisting specific performance. (*h*) So, where the defendant speculates upon facts, which turn out contrary to his expectation, he cannot rely on his mistaken view; and his mistake as to the use which he might make of the property, is unimportant. (*i*)

Mistake, if relied on, must be clearly proved, (*k*) and parol evidence is admissible for the purpose. The acts of the parties subsequent to the contract may, in some cases, be material as evidence of mistake. (*l*)

3d. Cases where the defendant has obtained the like protection, when he has executed the agreement, knowing its terms and understanding its effect, but relying upon some misrepresentation (*m*) by the plaintiff, or upon some stipulation upon his part, which goes to vary the written agreement, but which he refuses to fulfil; *e. g.* a parol promise to vary the terms of a written agreement has been admitted as a defence to a bill, seeking its specific

(*e*) *Barnard v. Cave*, 26 Beav. 253.

Ex. 232, 238; *Mildmay v. Hungerford*, 2 Vern. 243.

(*f*) *Lightfoot v. Heron*, 3 You. & Coll. 586.

(*i*) *Mildmay v. Hungerford*, 2 Vern. 243.

(*g*) "It is said, *Ignorantia juris haud excusat*; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the 'jus' is used in the sense of denoting a private right, the maxim has no application." Per Lord Westbury, in *Cooper v. Phibbs*, L. R. 2 E. & Ir. Ap. 149, 170.

(*k*) *Clay v. Rufford*, 14 Jur. 803, V. C.W. "The defendant must show an honest mistake, not imputable to his own gross negligence." *The Western Railroad v. Babcock*, 6 Met. 352, per Shaw C. J.; and see *Alvanley v. Kinnaird*, 2 Mac. & G. 1.

(*l*) *Monro v. Taylor*, 8 Harc. 56.

(*h*) *Marshall v. Collett*, 1 You. & Col.

(*m*) See *Buxton v. Lister*, 3 Atk. 386; 7 Ves. 219; *Lovell v. Hicks*, 2 You. &

[performance. (*n*) So, too, a parol promise that the vendor shall have a lease of the property which he has, in writing, agreed to sell; (*o*) and the same decision has been come to in the case of a parol promise by the auctioneer, on behalf of the vendor, to allow compensation for a deficiency in quantity; the right to which was in effect negatived by the particulars; (*p*) so, where the vendor refused to perform his agent's engagement, that improvements should be executed on adjoining property; (*q*) but if the plaintiff offer to perform the agreement with — if the defendant so desire — the parol variation or addition, this is sufficient, and the defendant cannot set up the want of a perfect written contract. (*r*)

Where a stipulation is omitted from a written agreement, upon the supposition that it is illegal, and the parties trust to each other's honor; (*s*) or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted, (*t*) equity will hold the omission binding.

Stipulation
omitted by
consent, no
defence;

Nor is a breach by the plaintiff of an independent agreement, *r* (which is the same thing) of some independent stipulation in the agreement, any defence to a suit for specific performance. Thus, where A., in consideration of B.'s building a house, agreed to grant him a lease, and in case of any breach the agreement was to be void, and A. was to have the right to reënter, and by the same instrument A. agreed that B. should have the option of purchasing the fee at a

or a breach
by the plain-
tiff of an in-
dependent
contract or
stipulation.

Coll. 46; *Harris v. Kemble*, 5 Bligh N. S. 730, 754.

(*n*) *Clarke v. Grant*, 14 Ves. 519; *Micklethwaite v. Nightingale*, 12 Jur. 638; and see *Hammersley v. De Biel*, 12 Cl. & Fin. 45, 88; *Quinn v. Roath*, 37 Conn. 16.

(*o*) *Vouillon v. States*, 2 Jur. N. S. 845.

(*p*) *Winch v. Winchester*, 1 Ves. & Bea. 375, 378; and see Lord St. Leonards' remarks, 1 Sugden V. & P. (8th Am. ed.) 161, 162, upon Sir Thomas Plumer's remarks, in *Clowes v. Higginson*, 1 Ves. & Bea. 526.

(*q*) *Myers v. Watson*, 1 Sim. N. S. 523, 529; and see *Ross v. Watson*, 10 H. L. Cas. 672.

(*r*) *Martin v. Pycroft*, 2 De G., M. & G. 785. See, further, upon this subject,

Phipps v. Child, 3 Drew. 709; *Croome v. Lediard*, 2 Myl. & K. 251, and the remarks of Lord St. Leonards upon it, in 1 Sugden V. & P. (8th Am. ed.) 161, 163; *Lloyd v. Lloyd*, 2 Myl. & Cr. 192; *Omerod v. Hardman*, 5 Ves. 722, 730; *Vouillon v. States*, 2 Jur. N. S. 845.

(*s*) *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Hare v. Shearwood*, 1 Ves. jr. 241; *Haynes v. Hare*, 1 H. Bl. 659; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *White v. Anderson*, 1 Ir. Ch. Rep. 419. See *Gunter v. Thomas*, 1 Ired. Eq. 199; *Lee v. Kirby*, 104 Mass. 420, 430; 1 Sugden V. & P. 173.

(*t*) See *Shelburne v. Inchiquin*, 1 Bro. C. C. 350; *Jackson v. Cator*, 5 Ves. 688; *Rich. v. Jackson*, 4 Bro. C. C. 514, 518.

[stipulated price within a specified period, it was held that a breach by B. of provisions as to the insurance of the property, was no defence to a suit by B. to enforce his right of preëmption. (*u*)

4th. Cases where the written agreement is varied by parol subsequently to its execution; in which cases the variation, to be available as a defence, must be accompanied by such a part performance as would enable the court to enforce it if it were an original independent agreement; (*v*) subject, nevertheless, to the doctrine of equity which allows parties, by their acts, to vary the original agreement in respect of matters relating to title and the time for completion. (*w*)

4th. Subsequent parol variation part performed.

9. *As to Grounds of Defence negating in toto Plaintiff's Right to Specific Performance; viz. Personal Incapacity; Nature of Contract, or Fraud, &c., &c., attending its Execution: Matters relating to the Estate, Title, or Consideration; Plaintiff's Conduct, &c., after Contract; Election of other Remedy.*

We may next consider those grounds of defence which, assuming the existence of a *prima facie* valid agreement, go to negative, *in toto*, the right to specific performance; and these may, perhaps, be conveniently considered under the several heads of, — 1st, matters relating to the personal capacity of the parties to contract; 2d, matters relating to the nature of the agreement, or to the circumstances under which it was entered into; 3d, matters relating to the estate contracted for; 4th, matters relating to the title thereto; 5th, matters relating to the consideration; and, 6th, matters relating to the conduct of the plaintiff subsequently to the date of the agreement.

Defences negating *in toto* plaintiff's right to specific performance.

As to the first of the above heads. Personal incapacity on the part of the defendant to enter into the contract (*x*) is, of course, a sufficient defence to a suit for specific performance; unless, having recovered his contracting capacity, he has confirmed or adopted the agreement. We may

1st. Personal incapacity to contract — on part of defendant.

(*u*) *Green v. Low*, 2 Jur. N. S. 848. See, too, *Phipps v. Child*, 3 Drew. 709; *Croome v. Lediard*, 2 Myl. & K. 251.

(*v*) See *Legal v. Miller*, 2 Ves. 299; *Price v. Dyer*, 17 Ves. 356, 364; *Robinson v. Page*, 3 Russ. 121; 1 Sugden V. & P. (8th Am. ed.) 165, and note (*m*¹). Specific performance of a contract will not be

enforced if there was a subsequent agreement by parol to waive it, and substitute a new contract for it. *Ryno v. Darby*, 5 C. E. Green, 231. See *Quinn v. Roath*, 37 Conn. 16.

(*w*) 1 Sugden V. & P. (8th Am. ed.) 165, and notes (*n*) and (*p*¹).

(*x*) See *ante*, 185.

[here remark, that although intoxication, if excessive, amounts to a temporary deprivation of reason, (*y*) and is a good defence, although the party may not have been drawn in to drink by the plaintiff; (*z*) yet it has been held that the mere fact of the defendant having partaken freely of liquors at the time of entering into the contract, is not, in the absence of fraud, or of evidence that he was without the full understanding and knowledge of what he was doing, a reason for refusing specific performance; (*a*) especially as against a person who, with notice of the prior contract, has procured a conveyance of the property from the vendor. (*b*)

Intoxication.

Personal incapacity, on the part of the plaintiff at the time of the contract, cannot, it is conceived, be set up as a defence to a suit for specific performance, if the plaintiff has recovered his capacity at the time of filing the bill; (*c*) but the continuance of incapacity, at the time of the bill being filed, would appear to be a good defence; (*d*) and at any time during its continuance, the contract, it is conceived, may be put an end to by due notice from the party bound; (*e*) except where the incapacity consists in infancy, in which case the other party appears to have no power to rescind the contract; (*f*) but the infant cannot, while an infant, enforce it. (*g*)

Personal incapacity on part of plaintiff, how far defence.

A contract by husband and wife for the sale of the wife's es-

(*y*) See *Cooke v. Clayworth*, 18 Ves. 12, 16; *Cragg v. Holme*, 18 Ves. 14 note; *Say v. Barwick*, 1 Ves. & Bea. 195; *Nagle v. Baylor*, 3 Dru. & W. 60.

(*z*) *Malins v. Freeman*, 2 Keen, 34. See *Prentice v. Achorn*, 2 Paige, 30; *Conant v. Jackson*, 16 Vt. 335; *Ford v. Hitchcock*, 8 Ohio, 214; 1 Story Eq. Jur. §§ 330, 331; *Campbell v. Ketcham*, 1 Bibb, 406; *Hutchinson v. Brown*, 1 Clarke, 408; *White v. Cox*, 3 Hayw. 82; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Morrison v. McLeod*, 2 Dav. & Bat. 221.

(*a*) *Lightfoot v. Heron*, 3 You. & Col. 586.

(*b*) *Shaw v. Thackray*, 1 Sm. & G. 537.

(*c*) *Clayton v. Ashdown*, 9 Vin. Abr. 393, 394.

(*d*) *Flight v. Bolland*, 4 Russ. 298; *Richards v. Green*, 8 C. E. Green, 536, 538, 539.

(*e*) See, and consider, *Martin v. Mitchell*, 2 Jac. & W. 428.

(*f*) See *Chambers on Infancy*, 442 *Shannon v. Bradstreet*, 1 Sch. & Lef. 58; *Smith v. Bowen*, 1 Mod. 25.

(*g*) *Flight v. Bolland*, 4 Russ. 298. See *Benedict v. Lynch*, 1 John. Ch. 373; *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346; 1 Sugden V. & P. (8th Am. ed.) 209. If the infant, after coming of age, files a bill to enforce performance of the contract, he thereby becomes bound by the contract, and the want of mutuality ceases. *Milliken v. Milliken*, 8 Ir. Eq. 16. So, if he in any other manner affirm the contract, upon arriving at full age, it becomes mutual. See *Milliken v. Milliken*, 8 Ir. Eq. 16. See, as to the transfer of shares to an infant, *Cappen's case*, L. R. 3 Ch. Ap. 458; *Curtis's case*, L. R. 6 Eq. 455; *Hart's case*, L. R. 6 Eq. 512.

[tate, may also, perhaps, be considered an exceptional case ; that is, if the purchaser, at the date of the contract, be aware that the property belongs to the wife. (*h*) A married woman may, it seems, enforce her contract for purchase, provided that her separate estate is sufficient to discharge her liabilities under it. (*i*) An agreement for purchase, entered into in the names of husband and wife, inures for the benefit of the wife surviving. (*k*)

As to the second of the above heads. Where the contract has been entered into for an illegal purpose, whether the same be expressly prohibited, or be merely the subject of a statutory penalty, equity will refuse to enforce it ; (*l*) but if the agreement is not positively illegal, the court will not refuse specific performance, merely because it “savors of illegality ;” (*m*) and if a legal agreement be intended in all events to be executed according to its terms, it will not necessarily be avoided by a collateral parol stipulation for something not *malum in se*, but merely prohibited ; (*n*) so, too, a distinction is drawn between enforcing an illegal contract, and asserting a title to money which has arisen from it. For example, where A. and B. fraudulently registered a ship in the United States, and their subsequent employment of her, so registered, was a fraud upon the English navigation laws ; it was held that A. might nevertheless maintain a suit against B. for an account and payment of his share of the realized profits of the speculation. (*o*) It would seem that an agent for purchase cannot, as against his principal, set up the illegality of the contract. (*p*)

(*h*) 2 You. & Col. C. C. 62.

(*i*) Dowling v. Maguire, Ll. & G. t. Plunkett, 1, c. 19; *ante*, 1441.

(*k*) Drew v. Martin, 2 H. & M. 130; 10 Jur. N. S. 356.

(*l*) See Thomson v. Thomson, 7 Ves. 470; Knowles v. Haughton, 11 Ves. 168; De Bagnis v. Armistead, 10 Bing. 107; Ewing v. Osbaldiston, 2 Myl. & Cr. 53, 85; Gas Light Co. v. Turner, 8 Scott, 609; and see Tomlinson v. Manchester & Birmingham Railway Co. 2 Rail. Cas. 104; Ritchie v. Smith, 6 Cl. B. 462; Smith v. Johnson, 37 Ala. 633; Great Northern Railway Co. v. Eastern C. Railway Co. 9 Hare, 306, 312; Dodson v. Swan, 2 W.

Va. 511; London & Brighton Railway Co. v. L. & S. W. Railway Co. 4 De G. & J. 389; Shrewsbury & C. Railway Co. v. London & N. W. Railway Co. 4 De G., M. & G. 115; 6 H. L. Cas. 112; but the defence is not favored in equity; S. C. 16 Beav. 451; and see Williams v. Bayley, L. R. 1 E. & Ir. Ap. 200.

(*m*) Aubin v. Holt, 2 K. & Jo. 66, 70.

(*n*) See Carolan v. Brabazon, 3 J. & L. 200.

(*o*) Sharp v. Taylor, 2 Phil. 801; and see Butt v. Monteaux, 1 K. & Jo. 98, 115; Sheppard v. Oxenford, 1 K. & Jo. 491.

(*p*) Mullock v. Jenkins, 14 Beav. 628. As to an agreement to give a qualification

[So, also, if the contract be in contravention of the rights of a third party, (*q*) equity will refuse to interfere; as where it derogates from a previous voluntary settlement by the plaintiff vendor; (*r*) but specific performance, will be enforced, at the suit of the purchaser, against the voluntary settlor. (*s*)

Interference with the rights of a third party.

So, also, if the contract be one which the court cannot execute in all its material terms; (*t*) so, where there are mutual rights incapable of being enforced by an immediate decree; (*u*) so, where the consideration of the contract is the execution of works which the court cannot superintend; (*v*) so, where it involves a contract for personal services of

Inability of the court to execute the contract.

to sit in parliament, see *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; *Harris v. Amery*, L. R. 1 C. P. 148; and see *May v. May*, 33 Beav. 81, where a conveyance by a father to his son, in order to qualify him as a voter, was upheld. *Childers v. Childers*, 1 De G. & J. 482; *Jackson v. Ham*, 15 John. 261; *Roberts v. Gibson*, 6 H. & J. 116. As to the ship registry act, see *Hughes v. Morris*, 2 De G., M. & G. 349; *M'Calmont v. Rankin*, 2 De G., M. & G. 403; *Armstrong v. Armstrong*, 3 Eq. R. 973; *Duncan v. Tindall*, 13 C. B. 258; *Parr v. Applebec*, 7 De G., M. & G. 585; *European & Co. Mail Co. v. Royal Mail & Co.* 4 K. & Jo. 676.

(*q*) See *Harnett v. Yielding*, 2 Sch. & Lef. 549, 554; and see and consider *Peacock v. Penon*, 11 Beav. 355.

(*r*) *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, Turn. & R. 281; *Campbell v. Ingilby*, 1 De G. & J. 393.

(*s*) *Buckle v. Mitchell*, 18 Ves. 101; *Daking v. Whimper*, 26 Beav. 568; 1 Sugden V. & P. (8th Am. ed.) 720, and notes (*p*) and (*g*).

(*t*) *Gervais v. Edwards*, 2 Dru. & W. 80; *Counter v. Macpherson*, 5 Moo. P. C. 83; *Downs v. Collins*, 6 Hare, 437; *Ford v. Stuart*, 15 Beav. 493; *Williamson v. Wootten*, 3 Drew. 210; *Paris Chocolate Co. v. Crystal Palace Co.* 1 Jur. N. S. 720; 3 Sm. & G. 119; and see *Dietrichsen v. Cabburn*, and *Hills v. Croll*, 2 Phil. 52, 60; *Waring v. Manchester & Co. Railway Co.* 7 Hare, 492; *Hope v. Hope*, 22 Beav.

351; *South Wales Railway Co. v. Wythes*, 5 De G., M. & G. 880; *Vansittart v. Vansittart*, 4 K. & Jo. 62; S. C. 2 De G. & J. 249 (Am. ed.) notes; *Fry Specif. Perf.* (2d Am. ed.) 334 *et seq.*; *King v. Rackman*, 5 C. E. Green, 316.

(*u*) *Blackett v. Bates*, L. R. 1 Ch. Ap. 117, reversing V. C. W. 2 H. & M. 270, 610; *Gervais v. Edwards*, 2 Dru. & W. 80; *Hills v. Croll*, 2 Phil. 60; *Firth v. Ridley*, 33 Beav. 516.

(*v*) See *Peto v. Brighton, Uckfield & Co. Railway Co.* 1 H. & M. 468. A specific performance of a contract to make a railway will not be enforced, the remedy is at law; 1 Sugden V. & P. (8th Am. ed.) 78, note (1); *Heathcote North Stafford Railway Co.* 20 L. J. N. S. 82; *South Wales Railway Co. v. Wythes*, 1 K. & J. 186; 3 Eq. R. 153; 5 De G., M. & G. 880; *Hamilton v. Dunsford*, 6 Ir. Ch. Rep. 412. See *Wilson v. Furness Railway Co.* L. R. 9 Eq. 28; *Ross v. Union Pacific R. R. Co.* 1 Woolw. 26, 36; *Fallon v. R. R. Co.* 1 Dill. 121; and as to building contracts, see *ante*, 1428. Contracts to work mines or quarries will not be specifically executed. *Pollard v. Clayton*, 1 K. & J. 462; *Booth v. Pollard*, 4 You. & Col. Ex. 61. As the court cannot specifically execute a contract to do certain *future acts*, it will not decree, as an equivalent, a covenant to do them (*Stocker v. Medderburn*, 3 K. & J. 393, 405; see *Blackett v. Bates*, L. R. 1 Ch. Ap. 117), unless it is part of the agreement that a covenant shall be entered

[an uncertain duration ; (*w*) as, *e. g.* where it was one of the terms of an agreement for the lease of a coal wharf, that the lessor should act as the lessees' agent in carrying on the business ; (*x*) so, an agreement either to borrow or to lend a sum of money upon mortgage cannot be specifically enforced. (*y*)

So, where the enforcement of the contract would be against public policy, as where it originated in the improper disclosure of evidence taken in a chancery suit, the court will not interfere ; (*z*) so, if its completion would amount to a breach of trust, (*a*) even by reason of any stipulation collateral to the mere agreement for sale, as where it was agreed that the purchaser should, out of the purchase-money retain a debt due to him from the selling trustee ; (*b*) so, where trustees concurred with other fiduciary vendors in a sale of three several properties for an entire sum, which they agreed to apportion among themselves, specific performance against the purchaser was refused. (*c*)

into (*Wilson v. West Hartlepool R. Co.* 2 De G., J. & S. 475) ; and a contract to do certain things and execute a deed, the deed being of the essence of the contract, will be enforced. *Granville v. Betts*, 19 L. J. N. S. Ch. 32. The court will not specifically execute an accessory agreement, unless it can also execute the principal one. *Scottish N. E. R. Co. v. Stewart*, 3 Macq. H. L. Cas. 382. And where one part of an award was capable of specific performance and another part not, the court refused to enforce performance of the former part. *Nickels v. Hancock*, 7 De G., M. & G. 300 ; *Blackett v. Bates*, L. R. 1 Ch. Ap. 117. But, in the case of a railway, if the interest of the party contracting with the company cannot be measured by damages, and the subject-matter of the contract is clear and definite ; for instance, a contract by a railway company to make and keep in repair an archway under their railway to connect the different parts of the land divided by it ; specific performance will be decreed. *Storer v. G. W. R. Co.* 2 You. & Col. C. C. 48. See *Lane v. Newdigate*, 10 Ves. 192 ; *Franklyn v. Tuton*, 5 Madd. 469 ; *Lytton v. G. N. R. Co.* 2 K. & J. 394.

(*w*) *Firth v. Ridley*, 33 Beav. 516 ; *Sykes*

v. Dixon, 9 Ad. & El. 693 ; *Johnson v. Shrewsbury & Birmingham Railway Co.* 3 De G., M. & G. 926, per Knight Bruce L. J. ; *Stoker v. Brocklebank*, 3 Mac. & G. 250 ; *Brett v. East India & Co.* 2 H. & M. 404 ; *Mair v. Himalaya Tea Co.* L. R. 1 Eq. 411.

(*x*) *Ogden v. Fossick*, 9 Jur. N. S. 288 ; 32 L. J. Ch. 73 ; *Chinnock v. Sainsbury*, 30 L. J. Ch. 409.

(*y*) *Rogers v. Challis*, 27 Beav. 175 ; 6 Jur. N. S. 334 ; *Sichel v. Mosenthal*, 8 Jur. N. S. 275 ; 30 Beav. 371.

(*z*) *Cooth v. Jackson*, 6 Ves. 12, 30.

(*a*) *Mortlock v. Buller*, 10 Ves. 292, 213 ; *Ord v. Noel*, 5 Madd. 438 ; *Bridger v. Rice*, 1 Jac. & W. 74 ; *Turner v. Harnay*, Jac. 178 ; *Wood v. Richardson*, 4 Beav. 174 ; *Baylies v. Baylies*, 1 Coll. 546 ; *Bellringer v. Blagrave*, 1 De G. & S. 66 ; *White v. Cuddon*, 8 Cl. & Fin. 766 ; *Sneesby v. Thorne*, 11 Jur. N. S. 536, 1038 ; 7 De G., M. & G. 399 ; *Maw v. Topham*, 19 Beav. 576 ; *Shrewsbury & Railway Co. v. London & N. W. Railway Co.* 4 De G., M. & G. 115.

(*b*) *Thompson v. Blackstone*, 6 Beav. 470.

(*c*) *Rede v. Oakes*, 10 Jur. N. S. 1246 ; reversing 32 Beav. 555. See as to several

[An agreement between husband and wife, providing for their future separation, is contrary to public policy, and cannot be enforced; (*d*) but if entered into after the separation has taken place, or on the eve and in contemplation of an intended separation, it may be upheld. Where the agreement is between the husband and a trustee for the wife, and is supported by a good consideration, as *e. g.* an indemnity by the trustee against his wife's debts, it can be specifically enforced; (*e*) and the agreement of either party not to sue for a restitution of conjugal rights, will be enforced by injunction.

In a very recent case an agreement entered into between A. and B. his father-in-law, upon the occasion of a separation between A. and his wife, whereby A. undertook to execute a formal deed of separation and to secure an annuity for the maintenance of his wife and child, was decreed to be specifically enforced, notwithstanding the absence of any indemnity to the husband against his legal liabilities; upon the ground that the agreement had been acted on by B., who had, at his own expense, maintained his daughter and her child upon the faith of it. (*f*)

So, if an agreement be entered into by an agent, the omission of all usual and proper stipulations in favor of his principal, (*g*) may be a reason for refusing specific performance; although, as a general rule, the court will not decline to enforce a contract on the mere ground of its improvidence. (*h*)

Improvident
contract by
agent.

So, although the court will not, as a general rule, decree specific performance of an agreement to enter into a partnership, (*i*) or to contribute a share of partnership capital; (*k*) yet where the parties have agreed to execute a

Agreement
for a partnership.

mortgagees of the same estate concurring in a sale, *McCarogher v. Whieldon*, 34 Beav. 107.

(*d*) *Westmeath v. Westmeath*, 1 Dow. & Cl. 519; *H. v. W.* 3 K. & Jo. 382; 2 Story Eq. Jur. §§ 1427, 1428; *The People v. Mercien*, 8 Paige, 47, 57; *Wilson v. Wilson*, 1 H. L. Cas. 538.

(*e*) *Wilson v. Wilson*, 1 H. L. Cas. 538; *Hunt v. Hunt*, 10 W. R. 215, reversing M. R. 31 Beav. 89; and see *Walrond v. Walrond*, John. 18; *Williams v. Bailey*, L. R. 2 Eq. 731.

(*f*) *Gibbs v. Harding*, L. R. 8 Eq. 490.

(*g*) *Helsham v. Langley*, 1 You. & Col. C. C. 175. See *White v. Cuddon*, 8 Cl. & Fin. 788, 791; *Daniel v. Adams*, Amb. 495; and *Dawson v. Brinckman*, 3 De G. & S. 386.

(*h*) *Sullivan v. Jacob*, 1 Moll. 472, 477.

(*i*) *Sheffield Gas &c. Co. v. Harrison*, 17 Beav. 294; and see *Maxwell v. Port Tenant Co.* 24 Beav. 495; *Scott v. Rayment*, L. R. 7 Eq. 112.

(*k*) *Sichel v. Mosenthal*, 30 Beav. 371; 8 Jur. N. S. 275.

[formal instrument, which, if executed, will alter their position at law, and enable them to assert a legal right, the execution of the formal instrument may be decreed, notwithstanding that the partnership thus created may be at once dissolved; (*l*) and the circumstance that the deed contains unenforceable provisions does not seem to be material. (*m*)

And the court will restrain the breach of negative clauses in a contract, although it cannot specifically enforce the entire contract; (*n*) because if the plaintiff at any time fail to perform his obligations, the injunction may be at once dissolved; (*o*) and where, if an injunction were not granted the damages would be incapable of estimation, the court may, it seems, restrain the breach of a positive engagement, even though the entire contract is not enforceable in equity. (*p*)

Equity has refused to enforce contracts on the mere ground of Hardship. their hardship as against the defendants; (*q*) as where one half the purchase-money would, under a clause of forfeiture contained in the will of a prior owner, have gone to a third party; (*r*) or, as where the contract provided that a road should be made by the vendor over property retained by him, and it appeared that the making of the road would risk the forfeiture of the lease of part of the estate; (*s*) but before the validity of such a defence is admitted, the court requires to be satisfied that forfeiture will be the necessary result of enforcing the contract, and also takes into consideration who is responsible for the forfeiture. (*t*) For

(*l*) *Buxton v. Lister*, 3 Atk. 385; *Stocker v. Wedderburn*, 3 K. & Jo. 403.

(*m*) *Stocker v. Wedderburn*, 3 K. & Jo. 403.

(*n*) *Great Northern Railway Co. v. Manchester &c. Railway Co.* 5 De G. & S. 138; *Lumley v. Wagner*, 1 De G., M. & G. (Am. ed.) 604, and cases in note (2); *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, 660.

(*o*) See *Stocker v. Wedderburn*, 3 K. & Jo. 393, 405.

(*p*) *Holmes v. E. C. Railway Co.* 3 K. & Jo. 675, 680.

(*q*) In *Lee v. Kirby*, 104 Mass. 428, Ames J. said: "We do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances, but certainly the general rule is that a mere decline in value since the date of the contract, is not to be regarded

by the court in cases of this nature; *Low v. Treadwell*, 3 Fairf. 441; *Coles v. Trecothick*, 9 Ves. 234; *Revell v. Hussey*, 2 Bal. & B. 287;" *Seymour v. Delancey*, 6 John. 225, 232; *Minturn v. Seymour*, 4 John. Ch. 500; *Woodcock v. Bennett*, 1 Cowen, 733; *Cathcart v. Robinson*, 5 Peters, 264; *Park v. Johnson*, 4 Allen, 259; *Western Railroad Corp. v. Babcock*, 6 Met. 346; *Eastman v. Plumbers*, 46 N. H. 464, 479; 1 Sugden V. & P. (8th Am. ed.) 161, and note (*z*¹), 211, and note (*c*); *Powers v. Mayo*, 97 Mass. 180; *Perkins v. Wright*, 3 H. & M'Hen. 324; *Cooper v. Pena*, 21 Cal. 44.

(*r*) *Fain v. Brown*, cited 2 Vcs. 307.

(*s*) *Peacock v. Penson*, 11 Beav. 355; and see *Helling v. Lumley*, 3 De G. & J. 493.

(*t*) *Helling v. Lumley*, 3 De G. & J. 493, 498.

[example, it will not permit a defendant to put himself in such a position as that his performance of the agreement shall create a forfeiture, and then turn round and say that the plaintiff shall not have specific performance of the agreement, because the defendant has, by his own act, enabled the landlord to enter upon the agreement being performed, (*u*) so, it has been held, that a mortgagor, contracting to grant a lease, should not be compelled to pay off the mortgage in order to enable him to complete the contract. (*v*) So, where a mortgagee, after foreclosure, contracted to sell at a profit, and inadvertently contracted in the character of a mortgagee with a power of sale, the court refused to compel him to exercise the power, and so run the risk of being held accountable for the purchase-money as mortgagee instead of absolute owner; (*w*) and where there was a *mutual* understanding, but no definite agreement between the mortgagee and intending lessee, that the agreement for a lease should be approved by the mortgagor, and he declined to concur, the court refused to enforce the agreement against the mortgagee, or to hold him liable in damages. (*x*) So, it is conceived, specific performance would be refused against a mortgagee who enters into the contract in the mistaken belief that his mortgagor will concur, but in such a case he would probably be held liable in damages. So, where the vendor entered into the contract in the belief that he was the absolute owner, and it subsequently turned out that he had only a power of sale and exchange, and was bound to reinvest the purchase-money, specific performance was refused. (*y*)

So, where the completion of the contract would involve a breach of trust, the court will, partly on the ground of the impolicy, or quasi-illegality of the transaction, and partly on the ground of hardship, decline to interfere. Thus, where a sale by trustees under a power was so disadvantageous as to be a breach of trust, the court refused to enforce the contract; (*z*) so, where the trustees of an estate joined, expressly in that capacity, with the beneficial owners in a contract for sale, and all agreed to exonerate the estate from any incum-

Breach of trust, when a defence on the ground of hardship.

(*u*) Per Turner L. J. in *Helling v. Lumley*, 3 De G. & J. 493, 498.

(*v*) *Costigan v. Hastler*, 2 Sch. & Lef. 160. But damages may in such a case be awarded under Lord Cairns's act. See *Howe v. Hunt*, 31 Beav. 420.

(*w*) *Watson v. Marston*, 4 De G., M. & G. 230.

(*x*) *Franklin v. Ball*, 33 Beav. 560.

(*y*) *Hood v. Oglander*, 11 Jur. N. S. 498, *sed quære*. See, also, *Howell v. George*, 1 Madd. 1; *Southwell v. Nicholas*, cited 1 Madd. 9, note.

(*z*) *Mortlock v. Buller*, 10 Ves. 292, 313.

[brances which might affect it, the court refused to enforce this agreement against the trustees, when it seemed probable that the incumbrances might, and perhaps materially, exceed the amount of purchase-money; (a) and the validity of this defence is not confined to cases where an express trust would be violated if the contract were enforced, but applies to every case, where its enforcement would involve a breach of confidence. (b)

So, where the contract was intended by both parties to be the means of forwarding a *common* object which had utterly failed before the bill was filed, the court refused to interfere. (c) So, in case of mutual, though distinct agreements, the subject-matter of the one *may* be so connected with that of the other, that the court will enforce both or neither. (d) Where, however, the contracts, though contained in the same instrument, are really independent, the breach of one is no defence to a suit for specific performance of the other. (e)

But where a solicitor contracted in his own name for the purchase of an estate, the fact of his having purchased for an undisclosed client, was held to be an insufficient defence on the ground of hardship; (f) so, also, where a person contracted for the lease of a mine, his ignorance of mining matters, and the fact of the mine having proved worthless, were held an insufficient defence. (g)

And in cases against public companies, the court will not consider the hardship inflicted upon individual members, if the contract be enforced, but will look to the rights and liabilities of the corporation itself. (h)

We may here remark, that the fact of the time within which a railway company is empowered to take land, having expired, is no defence to a suit to enforce against them their previous contract for purchase. (i)

(a) *Wedgwood v. Adams*, 6 Beav. 600; 8 Beav. 103; and see, as to hardship, *Talbot v. Ford*, 13 Sim. 173; *Hemingway v. Fernandes*, 13 Sim. 243; *Kimberley v. Jennings*, 6 Sim. 340; and *Webb v. London & Portsmouth Railway Co.* 9 Hare, 129.

(b) See *Mortlock v. Buller*, 10 Ves. 292, 313; *Shrewsbury & Birmingham Railway Co. v. London & N. W. Railway Co.* 4 De G., M. & G. 115; 6 H. L. Cas. 113; and see *Fry Specif. Perfm.* 115.

(c) *Padwick v. Hanslip*, 14 L. T. 543.

Sed aliter, if there was no such community of purpose. See *Webb v. The Direct London & Portsmouth Railway Co.* 9 Hare, 129.

(d) *Croome v. Lediard*, 2 Myl. & K. 260.

(e) *Green v. Low*, 22 Beav. 625.

(f) *Saxon v. Blake*, 29 Beav. 438.

(g) *Hayward v. Cope*, 25 Beav. 140.

(h) Per Lord Cottenham, in *Edwards v. Grand Junction Railway Co.* 1 Myl. & Cr. 650, 674.

(i) *Hawkes v. Eastern Counties Rail-*

[Hardship, in order to constitute a sufficient defence, must as a general rule, be proved to have existed at the date of the contract; (*k*) unless, perhaps, it has been occasioned by the subsequent acts of the party seeking specific performance.

Hardship, when ascertained.

So equity will refuse to enforce a contract which was procured by fraud, (*l*) or duress, or was entered into under a common mistake, (*m*) or, in many cases, a mistake only by the defendant; (*n*) or under the influence of surprise; (*o*) or was founded on a fraudulent or material misrepresentation or concealment (*p*) of facts by the plaintiff. (*q*)

Fraud, mistake, surprise, misrepresentation, or concealment.

way Co. 3 De G. & S. 743; 1 De G., M. & G. 737; 5 H. L. Cas. 331.

(*k*) *Webb v. London & Portsmouth Railway Co.* 9 Hare, 129; per Ames J. in *Lee v. Kirby*, 104 Mass. 428.

(*l*) As to evidence of which, see *Griggs v. Staples*, 2 De G. & S. 572.

(*m*) *Calverley v. Williams*, 1 Ves. jr. 211; *Stapylton v. Scott*, 13 Ves. 425, 427; *Clowes v. Higginson*, 3 Ves. & Beav. 524; *Lord Gordon v. Lord Hertford*, 2 Madd. 106; *Colyer v. Clay*, 7 Beav. 118; *Monro v. Taylor*, 8 Hare, 56; *Higgins v. Samels*, 2 Jo. & H. 460; *Cochrane v. Willis*, L. R. 1 Ch. Ap. 58; *Leuty v. Hillas*, 2 De G. & J. 110; *James v. State Bank*, 17 Ala. 69; *Cuff v. Dorland*, 50 Barb. 438; *Spurr v. Benedict*, 99 Mass. 466; *Solinger v. Jewett*, 25 Ill. 479; *Alvanley v. Kinnaird*, 2 Mac. & G. 7, 8; *Wuesthoff v. Seymour*, 7 C. E. Green, 66; *Gilroy v. Alis*, 22 Iowa, 174; *Snedaker v. Moore*, 2 Duvall (Ky.), 542; *White v. Williams*, 48 Barb. 222; 1 Sugden V. & P. (8th Am. ed.) 215. But specific performance may be enforced, although the vendor supposed the land sold to be less in quantity than it was, if he was well acquainted with it and had all the means of knowing the true quantity which the vendee had, and his ignorance had no influence in inducing him to make the bargain, although he would have considered it highly advantageous to himself if he had known how much land there really was; and although the vendee, when demanding performance of the agreement,

refused to exhibit it to the vendor. *Davis v. Parker*, 14 Allen, 94.

(*n*) See *Malins v. Freeman*, 2 Keen, 25; *Harnett v. Yielding*, 2 Sch. & Lef. 549, 554; *Howel v. George*, 1 Madd. 1, 11; *Baxendale v. Seale*, 19 Beav. 601; *Attborough v. Edwards*, 3 Eq. R. 124; *Swaishland v. Dearsley*, 29 Beav. 430; *Hood v. Oglander*, 11 Jur. N. S. 498; *Cuff v. Dorland*, 50 Barb. 438. It is a good defence to a bill for specific performance, that the defendant was led into a mistake, without any gross laches of his own, by an uncertainty or obscurity in the descriptive part of the agreement, so that the agreement applied to a different subject from that which he understood at the time. *Western Railroad Corp. v. Babcock*, 6 Met. 346; *Spurr v. Benedict*, 99 Mass. 466, 467.

(*o*) See *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Twining v. Morrice*, 2 Bro. C. C. 326; *Lord Townshend v. Stangroom*, 6 Ves. 328, 338; *Mortlock v. Buller*, 10 Ves. 305; *Willan v. Willan*, 16 Ves. 72; affirmed, 2 Dow, 274; and see 1 Story Eq. Jur. § 120, note.

(*p*) As to what is, see *Irvine v. Kirkpatrick*, 7 Bell Ap. c. 186, 232 *et seq.*; *Shirley v. Stratton*, 1 Bro. C. C. 410; *Reynell v. Sprye*, 1 De G., M. & G. 660; *Small v. Attwood*, 6 Cl. & Fin. 232; *Blake v. Mowatt*, 21 Beav. 603; but see *Hayward v. Cope*, 25 Beav. 140; concealments by vendor of a mine; *Zabriskie Ch. in Canover v. Wardwell*, 7 C. E. Green, 498; 1 Sugden V. & P. (8th Am. ed.) 214, 215.

(*q*) See *Clermont v. Tasburgh*, 1 Jac.

[Thus, where a vendor made a *bonâ fide* mistake, as to the authority which he had given to the auctioneer, and the **Mistake.** property was knocked down at a less sum than he had intended to accept, specific performance was refused; (*r*) but a mere inadvertent omission to insert an intended term in the contract, (*s*) or a mistake as to the legal consequences of an act, (*t*) or as to the purposes for which the property may be used, (*u*) is an insufficient ground of defence.

Where a mortgage was intended, but an absolute conveyance was in fact taken, the setting up of the latter by the **Fraud.** mortgagee was held to be a fraud, and parol evidence was admitted to prove the terms of the contract; (*v*) and where a

- & W. 112; Cadman v. Horner, 18 Ves. 10; Lovell v. Hicks, 2 You. & Col. 46; Cox v. Middleton, 2 Drew. 208; Barker v. Harrison, 2 Coll. 546; Harris v. Kemble, 5 Bligh N. S. 750; 1 Sugden V. & P. (8th Am. ed.) 211; Kerr F. & M. (18th Am. ed.) 358; Price v. Macaulay, 2 De G., M. & G. 339; Walters v. Morgan, 3 De G., F. & J. 718; Stewart v. Alliston, 1 Meriv. 26; Ainslee v. Medlycott, 9 Ves. 13, 14; Clement v. Reid, 9 Sm. & M. 535; Rodman v. Zilley, 1 Saxt. Ch. (N. J.) 320; Miller v. Chetwood, 1 Green Ch. 199; Wuesthoff v. Seymour, 7 C. E. Green, 66; Patterson v. Mertz, 8 Watts, 374; Fisher v. Worrall, 5 Watts & S. 278; Best v. Stow, 2 Sandf. Ch. 298; Schmidt v. Livingston, 3 Edw. Ch. 213; Seymour v. Delancey, 6 John. Ch. 225; Benedict v. Lynch, 1 John. Ch. 375, 379; Livingston v. Peru Iron Co. 2 Paige, 390; Acker v. Phoenix, 4 Paige, 305; Nellis v. Clark, 20 Wend. 24; Gurley v. Hiteshue, 5 Gill, 217; Young v. Frost, 5 Gill, 287, 313; Fuller v. Perkins, 7 Ohio, 196; Slack v. McLogan, 15 Ill. 242; Conybeare v. New Brunswick & C. Railway Co. 1 De G., F. & J. 578; Boynton v. Hazelboom, 14 Allen, 107; Patterson v. Bloomer, 35 Conn. 57; Powers v. Hale, 25 N. H. 145.
- (*r*) Day v. Wells, 7 Jur. N. S. 1004; 30 Beav. 220.
- (*s*) Parker v. Taswell, 2 De G. & J. 559. But see Broughton v. Hutt, 3 De G. & J. 501.
- (*t*) G. W. Railway Co. v. Cripps, 5 Hare, 91; Powell v. Smith, L. R. 14 Eq. 85. But see Patterson v. Bloomer, 35 Conn. 57.
- (*u*) Mildmay v. Hungerford, 2 Vern. 243.
- (*v*) Lincoln v. Wright, 4 De G. & J. 16; Marks v. Pell, 1 John. Ch. 594; James v. Johnson, 6 John. Ch. 417; Hodges v. Tennessee Ins. Co. 8 N. Y. 416; Despard v. Walbridge, 15 N. Y. 374; Webb v. Rice, 6 Hill, 219; Mann v. Falcon, 25 Texas, 271; Hannay v. Thompson, 14 Texas, 142; Davis v. Hopkins, 15 Ill. 519; Reigard v. McNeil, 38 Ill. 400; Conner v. Chase, 15 Vt. 764; Hyndman v. Hyndman, 19 Vt. 9; Hinson v. Porter, 11 Humph. 587; McDonald v. McLeod, 1 Ired. Eq. 221; Sellers v. Stalcup, 7 Ired. Eq. 13; Taylor v. Luther, 2 Sumner, 228; Babcock v. Wyman, 2 Curtis, 386; S. C. 19 How. (U. S.) 289; Jenkins v. Eldredge, 3 Story, 293; Morris v. Nixon, 1 How. (U. S.) 118; 4 Kent, 143; Washburn v. Merrill, 1 Day, 140; Glass v. Hulbert, 102 Mass. 37; Kerr v. Gilmore, 6 Watts, 414; Bank of Westminster v. Whyte, 1 Md. Ch. 536; S. C. 3 Md. Ch. 508; Ing v. Brown, 3 Md. Ch. 521; Scott v. Henry, 13 Ark. 111; McCarron v. Cassidy, 18 Ark. 34; Smith v. Pearson, 24 Ala. 358; Cunningham v. Hawkins, 27 Cal. 603; Trucks v. Lindsey, 18 Iowa, 504; Thomas v. McCormack, 9 Dana, 109; Sweetland v. Sweetland, 3 Mich. 645; Vasser v. Vasser, 23 Miss. 378; Tibeau v. Tibeau, 22 Missou. 77. But in Massa-

[contract for the purchase of a partial interest in an estate has been procured by fraud, a subsequent contract for the purchase of the residue, if fairly referable to the prior contract, will share its fate. (*w*)

In a recent case, a security obtained from a father for his son's debt, under a tacit or implied threat that the son would be prosecuted for a felony, unless matters were satisfactorily arranged, was held to be invalid; not merely as being a misprision of felony, but also on the ground that the father was so situated as not to be a free and voluntary agent, (*x*) but the mere fact of a person being in prison at the time of signing the contract, is not of itself a sufficient defence. (*y*)

Duress.

Remarks on misrepresentation.

And where one party induces the other to contract on the faith of representations made to him, any one of which has been untrue, the whole contract is in a court of equity considered as having been obtained fraudulently; the effect of a partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party making the application; (*z*) for none can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed. (*a*) If the misrepresentation was made by the vendor, and as to a small portion only of the property, the subject of the contract, he cannot relieve the case by an offer to waive the portion affected by the representation. (*b*) And although the untrue repre-

chusetts, Maine, and New Hampshire, parol evidence seems to have been regarded at law as inadmissible to vary the terms of an absolute deed so as to make it a mortgage. See *Flint v. Sheldon*, 13 Mass. 443; *Harper v. Ross*, 10 Allen, 332; *Glass v. Hulbert*, 102 Mass. 37; *Hale v. Jewell*, 7 Greenl. 435; *Bryant v. Crosby*, 36 Maine, 562; *Ellis v. Higgins*, 32 Maine, 34; *Hebron v. Centre Harbor*, 11 N. H. 571; *Lund v. Lund*, 1 N. H. 39; as to Connecticut, see *Benton v. Jones*, 8 Conn. 186; and other states, *Watson v. Dixon*, 12 Sm. & M. 508; *Hovey v. Holcomb*, 11 Ill. 660; *Bragg v. Massie*, 38 Ala. 89; *George v. Norris*, 23 Ark. 121. How far parol evidence for this purpose is admissible in equity in Massachusetts and Maine, see *Newton v. Fay*, 10 Allen, 505; *Glass*

v. Hulbert, 102 Mass. 37; *Howe v. Russell*, 36 Maine, 115; *Richardson v. Woodbury*, 43 Maine, 206.

(*w*) *Reynell v. Sprye*, 1 De G., M. & G. 660; *Yonge v. Reynell*, 9 Hare, 809.

(*x*) *Williams v. Bayley*, L. R. 1 E. & Ir. Ap. 200.

(*y*) *Brinkley v. Hann*, 1 Drew. 175. See *Cumming v. Ince*, 12 Jur. (Q. B.) 331; *Petre v. Espinasse*, 2 Myl. & K. 426; *Selby v. Jackson*, 6 Beav. 192.

(*z*) *Viscount Clermont v. Tasburgh*, 1 Jac. & W. 119, 120; *Stewart v. Allison*, Meriv. 26.

(*a*) Per Lord Cranworth, in *Reynell v. Sprye*, 1 De G., M. & G. 708.

(*b*) *Viscount Clermont v. Tasburgh*, 1 Jac. & W. 119, 120.

[sentation may in the first instance have been the result of innocent error, yet if, after the error has been discovered, the party, who has innocently made the incorrect representation, suffers the other party to continue in error, and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of equity, a fraudulent misrepresentation, even though it was not so originally, (c) and a ground for rescinding the executed contract. (d)

If, however, the party to whom the representations were made, himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained; and thus the notion of reliance on the representations made to him may be excluded. (e)

So, where the subject of the contract is in its nature uncertain, — where all that is known about it is matter of inference from something else, — the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, — it may not be easy to presume that representations made by one would have any material influence upon the other; (f) and it has been laid down that if a purchaser, choosing to judge for himself, does not avail himself of the means of knowledge open to him or to his agents, he cannot pretend, by way of defence, that he was deceived by the vendor's representations. (g)

(c) Per Lord Cranworth, in *Reynell v. Sprye*, 1 De G., M. & G. 708. 1 R. & M. 128; *Johnson v. Smart*, 2 Giff. 151; *Powers v. Mayo*, 97 Mass. 180; *Silver v. Frazier*, 3 Allen, 382, 383, 384.

(d) *Clapham v. Shillito*, 7 Beav. 149.

(e) See *Dyer v. Hargrave*, 10 Ves. 505; *Grant v. Munt, Coop.* 177; *Lord Brooke v. Rounthwaite*, 5 Hare, 306; *Haywood v. Cope*, 25 Beav. 140; *Clarke v. Mackintosh*, 4 Giff. 134; *Henderson v. Hudson*, 15 W. R. 860; *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 233, and note (2); *Kerr F & M.* (1st Am. ed.) 359; *Scott v. Hanson*,

(f) See judgment in *Clapham v. Shillito*, 7 Beav. 149; and see *Pulsford v. Richards*, 17 Beav. 96; *Jennings v. Broughton*, 5 De G., M. & G. 126; *Haywood v. Cope*, 25 Beav. 140.

(g) *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 232, 233, note (2); *Silver v. Frazier*, 3 Allen, 383, 384.

[Thus, in a late case, a purchaser of mines which proved to be worthless, having personally inspected them before signing the contract, was not allowed to set up his ignorance of mining matters as a defence to the vendor's suit ; (*h*) and it was also held that there was no obligation on the vendor to inform the purchaser that the mine had been previously worked, and found unprofitable. (*i*)

as, *e. g.* as to the value of a mine.

And an agreement, fair as between the parties, is not invalid, merely because it may have been concocted and brought about by a third person, with a fraudulent intention of benefiting himself. (*k*)

Agreement, fair as between parties, not avoided by fraud of third person.

There can be no specific performance, if the description of the property is of so ambiguous a nature, that it cannot with certainty be known what the purchaser imagined himself he was contracting for. (*l*) A vendor of property who makes statements respecting the property, is bound to make them free from all ambiguity ; and the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statements. (*m*) It is the duty of every vendor to state all the circumstances connected with the property he is selling, and the incidents to which it is subject, in such a manner that they can be understood by a person of ordinary intelligence, and not merely in such a way that only a skilled lawyer would be able to ascertain the nature of the title under which he is purchasing. (*n*)

Ambiguous and uncertain description of property.

(*h*) *Haywood v. Cope*, 25 Beav. 140.

(*i*) *Haywood v. Cope*, 25 Beav. 140.

(*k*) *Bellamy v. Sabine*, 2 Phil. 425.

(*l*) *Stewart v. Alliston*, 1 Meriv. 26 ; *Leyland v. Illingworth*, 2 De G., F. & J. 253 ; 1 Sugden V. & P. (8th Am. ed.) 213, 214.

(*m*) *Martin v. Cotter*, 3 J. & L. 496, 507 ; *Drysdale v. Mace*, 5 De G., M. & G. 107 ; *Swaisland v. Dearsley*, 29 Beav. 430.

(*n*) *Sheard v. Venable*, 36 L. T. Ch. 922. An agreement to sell land is, in the absence of any restrictive expressions, an agreement to sell the whole of the vendor's interest therein ; *Bower v. Cooper*, 2 Hare, 408 ; and such interest, if not described, will be inferred to be an estate in fee simple. *Hughes v. Parker*, 8 M. & W. 244 ;

and see *Cattell v. Corral*, 4 You. & Coll. 228, 236 ; but it may be shown, even in support of a bill for specific performance, that the purchaser knew the actual nature of such interest, see *Cowley v. Watts*, 17 Jur. 172 ; *Cox v. Middleton*, 2 Drew. 217 ; and unless the contrary be expressed, the interest offered for sale (whether it be absolute or qualified) will be presumed to be accompanied by all those advantages which are legally incidental to it. *Skull v. Glenister*, 16 C. B. N. S. 81 ; 33 L. J. C. P. 185 (a case of right of way appurtenant, though not mentioned, passing by a parol demise). Therefore, an infringement of the rule, *Cujus est solum ejus est usque ad cælum et ad inferos*, is (if not mentioned in the particulars), sufficient to render the contract voidable by the purchaser ; *Pope*

[Want of mutuality of remedy is a ground of defence not unfrequently relied on; and respecting which the rules of the court seem somewhat undefined. (*o*) The principle would seem to be one of apparent equity, viz.: that a defendant ought not to be harassed with litigation founded on an agreement which he himself could not enforce, if the plaintiff were to think fit to stop the proceedings. For this reason, it was once doubted whether a plaintiff could enforce a written agreement which he himself had not signed; but it was ultimately decided (*p*) that he could; inasmuch as filing the bill binds him to the contract, and from that time there is mutuality. (*q*) So the personal incapacity of the plaintiff to enter into the contract, is, generally, if subsisting at the time of the bill being filed, a good defence. (*r*) But the fact of one party to a contract having so acted as to preclude his right, (*s*) or even having by accident lost his right (*t*) to enforce it in equity, will not affect the remedies of

v. Garland, 4 You. & Coll. 403; see *Lewis v. Braithwaite*, 4 B. & Ad. 437; *Keyse v. Powell*, 2 El. & Bl. 132; *Sparrow v. Oxford &c. Railway Co.* 2 De G., M. & G. 108; so, where there was no title to an underground cellar, the defect was held fatal; *Whittingdon v. Corder*, 16 Jur. 1034; so, where there was a want of title to such proper access to a house as, under the description, the purchaser was justified in expecting; *Stanton v. Tattershall*, 1 Sm. & Giff. 529; so, where on a sale of arable land no right of way was shown thereto for carts and carriages; *Denne v. Light*, 3 Jur. N. S. 627; so, where on a sale of ground rents proper powers of distress and entry could not be conferred on the purchaser. *Langford v. Selmes*, 3 K. & Jo. 220.

(*o*) 1 Sugden V. & P. (8th Am. ed.) 217, and note (*x*¹); *Jordan v. Deaton*, 23 Ark. 704; *Duvall v. Myers*, 2 Md. Ch. 401. In *Ewing v. Gordon*, 49 N. H. 457, Foster J. said: "We understand that the obligation is mutual where both parties are required by the agreement to do something; the agreement of the one being a consideration for that of the other; that it makes no difference in this respect whether the obligation of the one is secured

by bond, and that of the other is not thus secured, nor that when the cause comes on for hearing the plaintiff's part of the agreement has not actually been performed, if its fulfilment is tendered, and can be secured by the same decree which compels specific performance by the defendant; and especially if the defendant has sustained no damage, or none which cannot be compensated by the decree."

(*p*) See *Butler v. Powis*, 2 Coll. 161; *Smith & Peck's App.* 69 Penn. St. 474, 480

(*q*) *Martin v. Mitchell*, 2 Jac. & W. 427; 1 Sugden V. & P. (8th Am. ed.) 217, note (*x*¹); *Duvall v. Myers*, 2 Md. Ch. 401; *Coleman v. Upcot*, 5 Vin. Abr. 528; *Dowell v. Dew*, 1 You. & Col. C. C. 345; *Butler v. Powis*, 2 Coll. 161. See *London & Birmingham Railway Co. v. Winter, Cr. & Phil.* 57; but see *Gaskarth v. Lord Lowther*, 12 Ves. 107.

(*r*) *Ante*, 1465; and see 1 De G., M. & G. 525.

(*s*) *South Eastern Railway Co. v. Knott*, 10 Hare, 122; *Hawkes v. Eastern Co. Railway Co.* 1 De G., M. & G. 758; 5 H. L. Cas. 331.

(*t*) *Hawkes v. Eastern Co. Railway Co.* 1 De G., M. & G. 758.

[the other party; and it not unfrequently happens, in other cases, that plaintiffs obtain decrees for specific performance of agreements, the specific performance of which could not have been enforced against them as defendants. (*u*)

The non-mutuality defence has generally been grounded upon the alleged entire, or partial, want of title in a plaintiff vendor; such want of title, it must be remembered, being urged as an objection to the existence or validity of the contract; and not by way of denial of his present ability to give to, or procure for, the defendant, his rights under the same. Thus it has been held, that A. cannot enforce against C. an agreement for the sale to him of B.'s estate; even although B. be willing to confirm the contract; (*v*) and it has been considered doubtful by Lord St. Leonards, (*w*) "whether there is any case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report." (*x*)

When founded on alleged want of title in plaintiff vendor.

But, as a general rule, where no legal invalidity affects the contract, the enforcement of it in equity is a matter of judicial discretion; (*y*) and in several cases, specific performance has been decreed at the suit of vendors who, contracting under the *bonâ fide* belief that they could

The jurisdiction is discretionary with the court.

(*u*) See *Martin v. Pycroft*, 2 De G., M. & G. 785, 795; *Fennelly v. Anderson*, 1 Ir. Ch. Rep. 706.

(*v*) *Noel v. Hoy*, cited 1 Sugden V. & P. (8th Am. ed.) 217; and see *Tendring v. London*, 2 Eq. Ch. Ab. 680; *Armiger v. Clarke*, Bunb. 111; *Hamilton v. Grant*, 3 Dow, 33, 42.

(*w*) Sugden V. & P. (12th Eng. ed.) 241, note (*p*).

(*x*) See, upon this point, *Bryan v. Lewis*, Ry. & Moo. 386 (a case at law on a sale of goods); *Lechmere v. Brasier*, 2 Jac. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & M. 296. In *Dresel v. Jordan*, 104 Mass. 415, Wells J. said: "The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by the offer to fulfil by the other party, and request for conveyance, the seller will be allowed reasonable time and opportunity

to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance in order to entitle himself to the consideration." See *Hurley v. Brown*, 98 Mass. 546, 547, and the observations upon the rule there stated by Wells J. in *Dresel v. Jordan*, 104 Mass. 414; *Barnard v. Lee*, 97 Mass. 92; *Richmond v. Gray*, 3 Allen, 25; *Tyson v. Smith*, 8 Texas, 147; *Jones v. Taylor*, 7 Texas, 240; *More v. Smedburgh*, 8 Paige, 600; *Reeves v. Dickey*, 10 Grattan, 138; *Purcell v. McCleary*, 10 Grattan, 246; 1 Sugden V. & P. (8th Am. ed.) 264, note (*b*¹).

(*y*) *Salisbury v. Hatcher*, 2 You. & Col. C. C. 64; and see remarks of Lord Eldon

[make a good title, afterwards, discovering that they had no title either legal or equitable, procured the concurrence of the necessary parties; (z) as, also, at the suit of the vendors who had contracted to sell the fee-simple, knowing that they had only a life estate or other limited interest, and relying on being able to procure the concurrence of the parties entitled in remainder; (a) so, it would seem, a vendor who has contracted to sell, in the *bonâ fide* belief that he is absolutely entitled, when in fact he has only a partial interest, may enforce the contract, if he is ultimately able to complete the title. (b)

And it seems by no means clear, whether, even in the extreme case of A. contracting to sell the estate of B., A. would not be entitled to specific performance, if, by procuring a conveyance from B., he were able to make a good title, at the time fixed for the delivery of the abstract, or even at the time fixed for completion. (c) Perhaps, in most of such cases,

in *White v. Damon*, 7 Ves. 35, as to how the discretion is to be exercised; *ante*, 1434; *Eastman v. Plumer*, 46 N. H. 464, 478, 479.

(z) *Supra*, note (x); *Dresel v. Jordan*, 104 Mass. 414, 415; *Hurley v. Brown*, 98 Mass. 545; *Richmond v. Gray*, 3 Allen, 25. See *Hoggart v. Scott*, 1 Russ. & Myl. 293, a case of mistake as to the proper parties to exercise a power of sale under a will; *Chamberlain v. Lee*, 10 Sim. 444, where the frontage of the estate was found to belong to a third person; *Eyston v. Symonds*, 1 You. & Col. C. C. 608, where the estate had escheated to the crown; and see *Williams v. Carter*, cited 1 Sugden V. & P. 217; *Graham v. Oliver*, 3 Beav. 124; *Hawkes v. Eastern Co. Railway Co.* 1 De G., M. & G. 737; 5 H. L. Cas. 331.

(a) *Lord Stourton v. Meers*, cited 2 P. Wms. 630; *Wynn v. Morgan*, 7 Ves. 202; *Coffin v. Cooper*, 14 Ves. 205; *Salisbury v. Hatcher*, 2 You. & Col. C. C. 54.

(b) *Murrell v. Goodyear*, 1 De G., F. & J. 432; 6 Jur. N. S. 91; on appeal, 358.

(c) See *Mortlock v. Buller*, 10 Ves. 315; *Boehm v. Wood*, 1 Jac. & W. 421; and see *Salisbury v. Hatcher*, 2 You. & Col. C. C. 64; *Dresel v. Jordan*, 104 Mass. 414, 415; *Hurley v. Brown*, 98 Mass. 545.

Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bonâ fide* contractor; *Tendring v. London*, 2 Eq. Cas. Abr. 680, pl. 9; 10 Ves. 315; 1 J. & W. 421; *Bryan v. Lewis*, 1 Moo. & Ry. 386; *Hurley v. Brown*, 98 Mass. 547; *Dresel v. Jordan*, 104 Mass. 414; and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual, which, perhaps, is of itself a sufficient objection in a case of this nature. See *Jordan v. Deaton*, 23 Ark. 704; *Duvall v. Myers*, 2 Md. Ch. 401; *Fry Specif. Perfm.* (2d Am. ed.) 198, § 286 *et seq.*; *Johnson v. Shrewsbury & Birmingham Railway Co.* 3 De G., M. & G. 927; *Stocker v. Wedderburn*, 3 K. & J. 393; *Dresel v. Jordan*, 104 Mass. 407; *Morgan v. Rainsford*, 8 Ir. Eq. R. 399; *Flight v. Bolland*, 4 Russ. 298; *Ld. J. Stuart v. London & North Western Railway Co.* 1 De G., M. & G. 721.

[the material point may be, whether the purchaser, upon discovering that the estate is not bound, has at once repudiated the contract, or has continued to negotiate upon the footing of its being still subsisting. (*d*) Thus, in a late case, it has been held that if a purchaser intends to rely on the objection that the vendor has only a limited interest, he must do so at once, and cannot avail himself of it, after having required the concurrence of persons who can complete the title. (*e*)

But the purchaser may, by his contract, preclude himself from objecting that the consent of a specified person is necessary, or that the sale is a breach of trust; thus, *e. g.* where trustees for sale, who had no power of leasing, granted leases which had materially lessened the value of the property, and then expressly sold the estate, subject to the unauthorized leases, — the want of authority being plainly disclosed, — the title was forced upon the purchaser. (*f*)

Purchaser, when precluded from taking the objection.

The existence of a heavy incumbrance on the estate, and the mental incapacity of the incumbrancer, being matters of conveyance and not of title, are no conclusive defence to a vendor's suit. (*g*)

The existence of an incumbrance not a matter of defence.

The fact that the vendor contracted to sell his own estate, in the name of, or as agent for, another; (*h*) or that the nominal purchaser was in fact the agent for a third person with whom the vendor has quarrelled upon other matters, (*i*) or to whom he has given a bare refusal (*k*) to deal for the estate; is not, in general, any defence to a suit for specific performance; unless the case can be brought within the class, in which it is shown that the misrepresentation was used as the inducement to the defendant to enter into the contract. (*l*)

Nominal contractor.

(*d*) See *Eyston v. Symonds*, 1 You. & Col. C. C. 608; *Salisbury v. Hatcher*, 2 You. & Col. C. C. 65.

(*e*) *Murrell v. Goodyear*, 1 De G., F. & J. 432; *Nock v. Newman*, cited and stated 2 Dart. V. & P. (4th Eng. ed.) 970, 971. But see *Adams v. Broke*, 1 You. & Col. C. C. 627, 630; *Forrer v. Nash*, 6 N. R. 361; 35 Beav. 167.

(*f*) *Nicholls v. Corbett*, 3 De G., J. & S. 18; 34 Beav. 376.

(*g*) *Duke of Beaufort v. Glynn*, 1 Jur. N. S. 888; affirmed, 890.

(*h*) *Fellowes v. Lord Gwydyr*, 1 Russ. & M. 83.

(*i*) *Hall v. Warren*, 9 Ves. 605.

(*k*) 1 Sugden V. & P. 219, citing *Lord Irnham v. Child*, 1 Bro. C. C. 92, 95; *sed quære*, whether this doctrine can be extended to cases of refusal, grounded on any particular and specified reason. See 1 Coll. 219; and see *Popham v. Eyre*, Lofft, 786; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

(*l*) *Phillips v. Duke of Bucks*, 1 Vern. 227; *Scott v. Langstaffe*, cited Lofft, 797;

[The insertion in the contract of a penalty in case of non-performance, is no defence to a suit for specific performance ; (*m*) nor, it seems, is a stipulation for the payment of a specified sum as liquidated damages ; (*n*) in fact, decrees have been made upon agreements, which took the shape of bonds ; (*o*) but the obligee must elect between his legal and equitable remedies. (*p*) A bond void at law may be a good agreement in equity. (*q*)

The circumstance that damages could not be recovered upon the contract at law, is not, universally, a good defence to a suit for specific performance, although, as observed by Lord Hardwicke, (*r*) "There are very few cases in which a court of equity can decree a performance of a covenant or agreement upon which there can be no action at law, according to the words of the articles and the events which have happened ;" Lord St. Leonards considers the result of the authorities (which are conflicting) to be, that although "equity cannot contradict or overturn the grounds, or principles of law," it will yet decree specific performance of an agreement void at law, "if there is a clear ground for the interference of equity, according to the general rules of the court." (*s*)

and see *Nelthorpe v. Holgate*, 1 Coll. 203. It appears that specific performance was decreed in *Phillips v. Duke of Bucks*, See 14 Ves. 527, note. The duke's equity seems to have been of (according to modern notions) a very doubtful character ; amounting in substance to his having sold the estates at an under value, by way of bribe to the chancellor before whom causes, in which the duke was interested, were depending. See the account of the transaction from Roger North, cited 1 Sugden V. & P. 219.

(*m*) *Howard v. Hopkyns*, 2 Atk. 371 ; *Coles v. Sims*, 5 De G., M. & G. 1 ; *Parks v. Wilson*, 10 Mod. 515 ; *Belchior v. Reynolds*, 2 Ld. Ken. 2d part, 87 ; *Saintier v. Ferguson*, 1 Mac. & G. 286 ; *Gordon v. Brown*, 4 Ired. Eq. 399 ; *Gillis v. Hall*, 2 Brewst. 342 ; *ante*, 1320, 1321.

(*n*) *Darby v. Whitaker*, 4 Drew. 134.

(*o*) *Hobson v. Trevor*, 2 P. Wms. 191 ; *Logan v. Wienholt*, 1 Cl. & Fin. 611 ; *Butler v. Powis*, 2 Coll. 156 ; *Ewing v.*

Gordon, 49 N. H. 444 ; *Dooley v. Watson*, 1 Gray, 414 ; *Hall v. Sturdivant*, 46 Maine, 34 ; *Plunkett v. Meth. Epis. Soc.* 3 Cush. 561 ; *Barnard v. Lee*, 97 Mass. 92 ; but not if the plaintiff have enforced the penalty, *Saintier v. Ferguson*, 1 Mac. & G. 286. As to the jurisdiction of a court of equity to restrain a breach of an agreement secured by a bond, see *Clarkson v. Edge*, 33 Beav. 227 ; *Fox v. Scard*, 33 Beav. 327, 328.

(*p*) *Fox v. Scard*, 33 Beav. 327, 328.

(*q*) *Squire v. Whitton*, 1 H. L. Cas. 333.

(*r*) See *Whitmel v. Farrel*, 1 Ves. 256, 258.

(*s*) 1 Sugden V. & P. 220, and see cases there referred to. On the other hand, the fact of damages being recoverable at law, is inconclusive as to the right in equity. A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the party seeking the specific performance, if it be conscientious that that agreement

[And equity will not decree specific performance of part of a contract, if unable to enforce specific performance of all its material terms. (*t*)

Contract in capable of complete performance.

As to the third of the above heads. Upon defects in the estate itself, we may refer to former observations respecting misdescriptions and compensation; (*u*) we may also remark that, although either the original non-existence of, or the want of a sufficient title to, a material part of the property, or that part of it which may have formed the inducement to the purchaser, is a sufficient defence to a bill for specific performance, yet mere non-existence does not, universally, as a ground of defence, stand so high as want of title; for it may, obviously, be often a very different matter to a purchaser whether he be simply unable to get a particular part of what he contracted for, or whether such part will be liable to be held by another person, and converted into a nuisance. (*v*)

3d. Matters relating to estate; original defects in how far a defence.

It was considered, in one case, that the existence of a public nuisance, in the immediate neighborhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose (its existence, however, being unknown to either party, al-

Public nuisance.

should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance. See *White v. Butcher*, 6 Jones Eq. 231; *Ewing v. Gordon*, 49 N. H. 444; *Viele v. Troy & Boston Railroad*, 21 Barb. 389; *Barnard v. Lee*, 97 Mass. 92; *Pennock v. Ela*, 41 N. H. 191; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case. *Davis v. Horne*, 2 Dow, 546; 2 Sch. & Lef. 341, 748; *Lennon v. Napper*, Ib. 684; 1 Sugden V. & P. (8th Am. ed.) 212, 213. But although damages may be recovered at law, yet equity is not thereby obliged to decree a specific performance; *Pope v. Harris, Loftt*, 791; *White's case*, 3 Swan. 108, note; *Martin v. Mitchell*, 2 J. & W. 420; *Bartlett v. Salmon*, 6 De G., M. & G. 33; *Higgins v. Samels*, 2 J. & H. 460; *Henderson*

v. Hays, 2 Watts, 148; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 Ala. 458; *Scars v. Boston*, 16 Pick. 357; *Faine v. Brown*, 2 Ves. 307; *Wedgwood v. Adams*, 6 Beav. 600. Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages. *Harnett v. Yielding*, 2 Sch. & Lef. 554; *Ellard v. Lord Llandaff*, 1 Bal. & B. 241; *Peacock v. Penson*, 11 Beav. 355. Equity will not help a party in performance of an agreement made on purpose to defraud creditors. *St. John v. Benedict*, 6 John. Ch. 111; *Herrick v. Grew*, 5 Wend. 579; *Gano v. Renshaw*, 2 Barr, 34.

(*t*) *Ante*, 1467, note (*t*).

(*u*) *Ante*, 1477. As to how far the purchasers of several lots are connected, see *post*, 1492, 1494; and see judgment in *Knatchbull v. Grueber*, 1 Madd. 167.

(*v*) See *Knatchbull v. Grueber*, 1 Madd. 153, 165.

[though easily ascertainable by the vendor), is no defence to his suit for specific performance, although it will induce the court to try the case strictly. (*w*)

So, in a recent case, where, pending a suit for specific performance, the defendants, a railway company, prosecuted their Publicincon-
venience. works in a manner contrary to the terms of the contract, and opened the line, it was held that the inconvenience which would be caused to the public by interfering with the traffic, was not an available defence. (*x*)

The accidental destruction or deterioration of the estate subsequently to the contract, is no defence to the vendor's bill for specific performance. The purchaser must bear any loss to the estate which occurs without the fault of the vendor : *e. g.* the deterioration of the property through the calamities of the times ; (*y*) the death of the *cestui que vie*, or the purchase of an estate for life, or a life annuity ; (*z*) or the destruction of house property by fire ; (*a*) or an earthquake ; (*b*) and as respects fire the vendor, unless he agrees that the property shall be kept insured, (*c*) or, it would seem, make some proposition to the purchaser grounded upon the fact of its being insured, need not keep up the insurance or give the purchaser notice of its having dropped ; (*d*) so, if the vendor, though not bound to insure, effects an improper insurance, and the property thereby becomes liable to

Destruction of estate not a purchaser's defence.

As in case of death of tenant for life, or of *cestui que vie*, or fire.

Vendor whether bound to insure.

(*w*) *Lucas v. James*, 7 Hare, 410, 418.

(*x*) *Raphael v. Thames Valley Railway Co.* L. R. 2 Ch. Ap. 147 ; reversing M. R. L. R. 2 Eq. 37.

(*y*) *Poole v. Shergold*, 2 Bro. C. C. 118.

(*z*) 1 Sugden V. & P. (8th Am. ed.) 291, 292 ; and see *Paine v. Meller*, 6 Ves. 352.

(*a*) See 1 Sugden V. & P. (8th Am. ed.) 291, and notes (*b*), (*c*), and (*d*) ; *McKechnie v. Sterling*, 48 Barb. 330 ; *Robb v. Mann*, 11 Penn. St. 300 ; *Reed v. Lukens*, 44 Penn. St. 200 ; *Hill v. Cumberland Valley Mut. Protection Co.* 59 Penn. St. 474 ; *Thompson v. Gould*, 20 Pick. 134 ; *Blew v. McClelland*, 29 Missou. 304 ; *Brewer v. Herbert*, 30 Md. 301 ; *Paine v. Meller*, 6 Ves. 349 ; *Harford v. Purrier*, 1 Madd. 532, 539 ; *Revell v. Hussey*, 2 Bal. & B. 287 ; and see *Poole v. Adams*, 12 W. R. 683, V. C. W. ; but see *Bacon v. Simp-*

son, 3 M. & W. 78 ; *Wells v. Calnan*, 107 Mass. 514 ; *Robinson v. Davison*, L. R. 6 Exch. 269 ; *Taylor v. Caldwell*, 3 B. & S. 826. *Aliter* if the vendors have agreed to repair or alter the premises, and have not done so before the fire. *Couter v. Macpherson*, 5 Bro. P. C. 83. See *Gibson v. Eller*, 13 Ind. 124 ; *Wainscott v. Silvers* 13 Ind. 497.

(*b*) *Cass v. Rudele*, 2 Vern. 280 ; but see 1 Bro. C. C. 157, note, where the case is said to be misreported. But a loss occurring to the property, before the vendor is in a condition to convey a clear unincumbered title, must fall on him, and not on the purchaser. *Christian v. Cabell*, 22 Grattan, 82.

(*c*) *Poole v. Adams*, 12 W. R. 683. See *Palmer v. Goren*, 25 L. T. N. S. 841.

(*d*) *Paine v. Meller*, 6 Ves. 353.

[forfeiture, he cannot enforce the contract. (*e*) The purchaser of house property must, as between himself and the vendor, make good any injury done to the adjoining premises by the fall of the buildings subsequently to the contract. (*f*)

As to the fourth of the above heads. Want of title to the estate is a defence which may occasionally be available as well to vendor as to purchaser. (*g*) As a general rule, however, a vendor will be compelled to convey his interest, if an imperfect one, in the estate, if the purchaser choose to accept it without compensation; (*h*) so he will be compelled to make good the contract out of any interest he has subsequently acquired; (*i*) or procure the concurrence of parties who are bound to convey at his request, (*k*) *e. g.* trustees of the legal estate; (*l*) so, a vendor, professing to sell an unincumbered estate, but having in fact only an equity of redemption, will be compelled to redeem the mortgage, and obtain a conveyance from the mortgagee. (*m*)

4th. Matters relating to title; want of title, considered as vendor's defence.

But equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require; *e. g.* a husband to procure the concurrence of his wife, (*n*) or son, (*o*) except, perhaps, where he has

Cases in which it is available.

(*e*) *Dowson v. Soloman*, 1 Drew. & Sma. 1; 8 W. R. 123; 6 Jur. N. S. 33.

(*f*) *Robertson v. Skelton*, 12 Beav. 260, 266.

(*g*) Equity will not decree the specific performance of a contract to convey real estate, when it appears that the vendor has no title to the estate agreed to be conveyed. *Chartier v. Marshall*, 51 N. H. 400; *Fitzpatrick v. Featherstone*, 3 Ala. 40; per *Shepley J.* in *Hill v. Hobart*, 16 Maine, 169.

(*h*) *Harnett v. Yielding*, 2 Scho. & Lef. 554; 1 Sugden V. & P. (8th Am. ed.) 218; *Bradley v. Munton*, 15 Beav. 460; *Barrett v. Ring*, 2 Sm. & G. 43; *Jones v. Belt*, 2 Gill, 106; *Laverty v. Moore*, 33 N. Y. 658; *Milligan v. Cooke*, 16 Ves. 1; *Lockett v. Williamson*, 31 Missou. 54.

(*i*) *Taylor v. Debar*, 1 Ch. Cas. 274; 2 Ch. Cas. 212; *Otter v. Lord Vaux*, 1 K. &

J. 650; 6, De G., M. & G. 638; *Scabourne v. Powel*, 2 Vern. 11; *Jennings v. Blincombe*, 2 Vern. 609; *Jones v. Kearney*, 1 Dru. & W. 159; *Carne v. Michell*, 10 Jur. 910, V. S. C.

(*k*) See *Howel v. George*, 1 Madd. 1, 11; *Costigan v. Hastler*, 2 Sch. & Lef. 160, 166.

(*l*) See 1 Sugden V. & P. (8th Am. ed.) 349; *Crop v. Norton*, 2 Ark. 74, 75.

(*m*) *Lord Bolingbroke's case*, cited 1 Sch. & Lef. 19, note. But a decree, requiring the vendor to remove certain incumbrances from an estate he had agreed to convey free of them, is erroneous, if it appears that he had no control over the parties from whom releases must be obtained. *Jerome v. Scudder*, 2 Rob. (N. Y.) 16.

(*n*) *Emery v. Wase*, 8 Ves. 505, 514; *Howel v. George*, 1 Madd. 1, 6. See *Jordan v. Jones*, 2 Phil. 170; *Ex parte Blake*,

[expressly agreed to procure such concurrence ; (*p*) or a tenant for life to procure the concurrence of trustees for sale of the reversion, they being under no obligation to comply with his request ; (*q*) nor will it compel him to perfect the title by exercising a power of purchasing and settling another estate in lieu of that which he has contracted to sell ; (*r*) or by making himself the personal representative of a deceased owner ; (*s*) or to complete a contract which he has entered into in the belief that he is absolute owner, whereas he can in fact only sell under a power of sale and exchange, and with a liability to reinvest the purchase-money ; (*t*) or to convey, as mortgagee, under a power of sale, an estate which he claims as absolute owner by foreclosure ; and thus render himself liable to account for the purchase-money ; (*u*) or, in the case of a fiduciary vendor, to carry out a contract, which reasonably expose him to liability at the suit of his *cestuis que trust*. (*v*)

16 Beav. 471. In several early cases it was held that where a husband agrees to convey his wife's estate he shall be compelled to perform the agreement specifically, by procuring his wife to join in the conveyance. See *Hall v. Hardy*, 3 P. Wms. 187 ; *Barrington v. Horne*, 2 Eq. Cas. Abr. 17, pl. 7 ; *Morris v. Stephenson*, 7 Ves. 474 ; *Winter v. Devreux*, 3 P. Wms. 189, note (B) ; *Wheeler v. Newton*, Pre. C. 16 ; *Withers v. Pinchard*, 7 Ves. 475, cited ; *Ortread v. Round*, 4 Vin. Abr. 303, pl. 4 ; *Emery v. Wase*, 5 Ves. 846 ; S. C. 8 Ves. 505 ; *Howel v. George*, 1 Madd. 1 ; *Fry Specif. Perfm.* (2d Am. ed.) 392 ; *Welsh v. Bayaud*, 6 C. E. Green (N. J.), 186. But the authority of these cases has been much shaken by the remarks of Lord Eldon, in the case of *Emery v. Wase*, 8 Ves. 505, and of Sir Thomas Plummer, in *Howel v. George*, 1 Madd. 7, and in *Martin v. Mitchell*, 2 J. & W. 425, and by those of Lord Mansfield, in *Davis v. Jones*, 1 New Rep. 267 ; and this jurisdiction is to be very sparingly exercised, and equity will seize on any reasonable ground as a bar to the aid of the court. *Ortread v. Round*, 4 Vin. Abr. 203, pl. 4 ; *Emery v. Wase*, 5 Ves. 846 ; *Daniel v. Adams*, Amb. 495 ; *Davis v. Jones*, 1 New Rep. 267 ; *Martin v. Mitchell*, 2 J. & W. 425 ; *Ex parte Blake*, 16 Beav. 463 ; *Hulmes v.*

Thorpe, 1 Halst. Ch. (N. J.) 415 ; *Hawralty v. Warren*, 3 Green Ch. (N. J.) 124 ; *Clarke v. Reins*, 12 Gratt. 98. Specific performance by a husband, of his contract to convey his wife's land, would not, if enforced, give title. The husband could not be compelled to procure a conveyance from his wife, nor could she, in any other way, be compelled, in a suit for such performance, to execute a conveyance. *Welsh v. Bayaud*, 6 C. E. Green (N. J.), 186. But if the husband joins in an executory contract for the purchase of an estate, though the deed is to be given to the wife, and the payment is to be made out of her property, he may be compelled to a specific performance. *Johnston v. Jones*, 12 B. Mon. 326.

(*p*) See *Emery v. Wase*, 8 Ves. 505, where the earlier cases are cited ; but the point seems very doubtful. See 1 Sugden V. & P. (8th Am. ed.) 206 ; *Jones v. Jackson*, 16 Ves. 367.

(*q*) *Thomas v. Dering*, 1 Keen, 729.

(*r*) *Howel v. George*, 1 Madd. 1.

(*s*) *Williams v. Bland*, 2 Coll. 575.

(*t*) *Hood v. Oglander*, 11 Jur. N. S. 488 ; *sed quære* ?

(*u*) *Watson v. Marston*, 4 De G., M. & G. 230.

(*v*) *Sneesby v. Thorne*, 1 Jur. N. S. 536, 1058 ; 7 De G., M. & G. 399. For other

[Where the want of title is only partial, — *i. e.* where it affects only part of the estate, or only part of that interest in it which was agreed to be sold, — the question arises, whether the vendor can resist the purchaser's claim to specific performance with a compensation, or, to speak more accurately, an abatement of the purchase-money.

Vendor,
when com-
pelled to con-
vey part of
estate with
an abate-
ment.

This right generally, but not universally, (*w*) exists in each class of cases. (*x*) Thus, want of title to the entire interest contracted for will not, it seems, be available as a defence for the vendor, if the purchaser elects to take such estate as the vendor can convey; (*y*) or to dispense with the concurrence of a person having a partial interest in the property, — as, *e. g.* a wife entitled to dower, — upon being allowed an abatement from his purchase-money. (*z*) So, the want of title to even a considerable part of the estate is not necessarily a reason why the vendor should not convey the residue. (*a*) But cases might occur, where, on the ground of hardship, equity would refuse to assist the purchaser; as in the case put by Lord St. Leonards, (*b*) of a vendor showing a good title to his mansion-house and park, but having no title to a “large adjoining estate held and sold with it.” In a case before Sir L. Shadwell V. C. where, upon a contract to sell the entirety of a lace manufactory, it appeared that the vendors had only nine sixteenths, and that the remaining shares clearly belonged to another party, who had also a charge on the vendors' shares for a sum nearly equal to the purchase-money, the court refused the purchaser specific performance with an abatement; (*c*) a decision which Lord St. Leonards suggests may be referred to the nature of the property, (*d*) but other-

cases, see *Mortlock v. Buller*, 10 Ves. 292, 316; 2 Bal. & B. 60; *Butler v. Powis*, 2 Coll. 156; *Ellard v. Lord Llandaff*, 1 Bal. & B. 241, 251.

(*w*) 1 Ves. & Bea. 353.

(*x*) *Mortlock v. Buller*, 10 Ves. 316; *Western v. Russell*, 3 Ves. & Bea. 192; *Wheatley v. Slade*, 4 Sim. 127; 1 Ves. & Bea. 353; *Hill v. Buckley*, 17 Ves. 401; 1 Sugden V. & P. (8th Am. ed.) 305 *et seq.* 316, and note (*q*¹).

(*y*) *Barrett v. Ring*, 2 Sm. & G. 43; 1 Sugden V. & P. (8th Am. ed.), 306, and cases in note (*r*), 316, and note (*q*¹). But if the purchaser elects to take such title as the vendor can give, with compensation

for the deficiency, he will be allowed as damages only the fair value of what is not conveyed. *Woodbury v. Luddy*, 14 Allen, 1.

(*z*) *Wilson v. Williams*, 3 Jur. N. S. 810; *Davis v. Parker*, 14 Allen, 94; *Park v. Johnson*, 4 Allen, 259; *Troutman v. Gowing*, 16 Iowa, 415; *Presser v. Hildebrand*, 23 Iowa, 483; *Corson v. Mulvany*, 49 Penn. St. 88.

(*a*) *Western v. Russell*, 3 Ves. & Bea. 187, 192.

(*b*) 1 Sugden V. & P. (8th Am. ed.) 316.

(*c*) *Wheatley v. Slade*, 4 Sim. 126.

(*d*) And see *Price v. Griffith*, 1 De G., M. & G. 80, 85.

[wise disapproves of; (*e*) he seems, however, to consider that the decision would have been correct, had the remaining shares been held by the vendors under a defective title.

In a subsequent case, the same learned vice chancellor, when the vendors had agreed to sell two sixths of certain leaseholds, and then found that they had only four twentieths, decreed specific performance with an abatement; observing, "this is very unlike a case where parties contract to sell the whole, but can only sell a part;" (*f*) from which remark, as in the case before the court, there was no question as to leaving part of the property in the hands of the vendors with a bad title, it may be inferred that his honor, upon general principles, approved of his former decision. (*g*)

In another case, it was held, that a condition for rescinding a contract, if counsel should be of opinion that a marketable title could not be made, enabled the vendor to rescind, upon counsel rejecting the title to one undivided third of the property; (*h*) so, in the converse case, where the purchaser had a right to rescind the contract, in case his objections to the title were not removed, and he gave notice to vacate the purchase, on the ground of the vendor's want of title to a small portion of the estate, it was held that he was not compellable to complete with an abatement. (*i*)

Of course, no such question can be raised by a vendor, when, upon a purchase of several lots, by the same purchaser, the title to one or more of such lots is found to be defective. (*k*)

As a general but not universal rule, every purchaser has a right to take what he can get, with compensation for what he cannot get; (*l*) but he cannot claim a conveyance of an interest to which a vendor shows a doubtful or defective title, with an abatement in respect of the imperfection in title, (*m*) except, perhaps, where the defect is of a temporary character, or is otherwise a fit subject for compensation. Thus, where

No abatement for defect in title.

(*e*) 1 Sugden V. & P. 318.

(*i*) Ashton v. Wood, 3 Jur. N. S. 1164.

(*f*) Jones v. Evans, 12 Jur. 664; and see, as bearing on the question, *à converso*, Reynell v. Sprye, 8 Hare, 222; 1 De G., M. & G. 660.

(*k*) See White v. Dobson, 17 Grattan, 262; Stoddart v. Smith, 5 Binney, 355, 363.

(*g*) See, also, Attorney General v. Day, 1 Ves. 218, 224; Maw v. Topham, 19 Beav. 576; 1 Story Eq. Jur. § 778; Reed v. Noe, 9 Yerger, 283; Bates v. Delavan, 5 Paige, 300.

(*l*) 1 Sugden V. & P. (8th Am. ed.) 305, 316, and note (*q*¹); Western v. Russell, 3 Ves. & Bea. 187; Wheatley v. Slade, 4 Sim. 126; per Turner L. J. in Hughes v. Jones, 3 De G., F. & J. 307, 315; Jacobs v. Locke, 2 Ired. Eq. 286.

(*h*) Williams v. Edwards, 2 Sim. 78.

(*m*) Williams v. Higden, 1 C. P. C. 500.

[a good title was deduced, but the vendor's wife refused to release her dower, specific performance was decreed at the purchaser's suit with a compensation. (n) Conduct or acquiescence on the part of the purchaser, which amounts to an acceptance of the title, may yet be insufficient as a waiver of his right to compensation. (o)

So, in general, when the vendor's *interest* is less than what he professes to sell, the purchaser may take what he can have, with an abatement; (p) as in the case put by Lord Eldon, (q) of a man contracting to sell the fee-simple, and having only a term for one hundred years; so, where the contract was, in effect, for an absolute term of twenty-one years, and it was found that the actual term might determine by the cesser of certain lives, specific performance was decreed, with an abatement in respect of the difference between the absolute and defeasible interests. (r) There was a similar decision where A. contracted for the purchase of an estate from B., who represented himself to be the owner in fee, but was in fact entitled only *pur autre vie*, with remainder to his wife in fee, specific performance was decreed at the suit of A., with compensation in respect of the interest of B.'s wife; (s) so, it was admitted by Lord Eldon (the case before him being that of a contract by a tenant for life for sale of the fee), (t) that if a vendor having a partial interest in an estate, enter into a contract, representing and agreeing to sell it as his own, the purchaser may take what he can have with an abatement. (u)

Vendor, when compelled to convey partial interest in estate, with abatement.

In two cases above referred to, (v) where the vendor's title was only contingently defective, it was held that the purchaser might take the estate with an indemnity; but it has been settled by subsequent decisions, that an indem-

Indemnity neither given nor taken compulsorily.

(n) *Wilson v. Williams*, 3 Jur. N. S. 810, V. C. W.; *Davis v. Parker*, 14 Allen, 94; *Park v. Johnson*, 4 Allen, 259, and cases cited, *ante*, 1487, note (z).

(o) *Hughes v. Jones*, 3 De G., F. & J. 307, 316.

(p) *Dyas v. Cruise*, 2 J. & L. 460; *Woodbury v. Luddy*, 14 Allen, 94.

(q) *Wood v. Griffith*, 1 Will. Ch. Ca. 44; 1 Sugden V. & P. 306.

(r) *Dale v. Lister*, cited 16 Ves. 7. See, also, p. 11.

(s) *Barnes v. Wood*, L. R. 8 Eq. 424; and see *Wilson v. Williams*, *supra*.

(t) *Mortlock v. Buller*, 10 Ves. 315.

(u) For other cases illustrating the principles acted on in compelling conveyance of partial interest, with abatement, see *Milligan v. Cooke*, 16 Ves. 11; *Hanbury v. Litchfield*, 2 Myl. & K. 629; *Painter v. Newby*, 11 Harc. 26; *Thomas v. Dering*, 1 Keen, 729; *Graham v. Oliver*, 3 Beav. 128; *Nelthorpe v. Holgate*, 1 Coll. 203; 1 Sugden V. & P. 308. As to the difficulty of fixing the amount of abatement, being a reason for refusing relief, see *White v. Cuddon*, 8 Cl. & Fin. 766, 792.

(v) *Dale v. Lister*, cited 16 Ves. 7, and *Milligan v. Cooke*, 16 Ves. 1.

[nity will not be enforced against either party, (*w*) unless it be provided for by special agreement. (*x*) For example, in a recent case, where the trustees of a settled estate, which, with other properties, was subject to a pecuniary charge, were empowered to sell at the request, and by the direction of the tenant for life, a contract entered into by the latter, without the consent of the trustees, was enforced after his death; but, in the absence of any special agreement, without any indemnity against the charge. (*y*)

And matters which would not be considered fit subjects for compensation as against a purchaser, may entitle him to an abatement of the purchase-money, if he elect to take the estate; (*z*) *e. g.* the existence of mining rights, (*a*) or rights of common over the estate, (*b*) or the want of a road which the vendor had agreed, but was unable, to make. (*c*)

If, however, the purchaser, at the time of entering into the contract, be aware of the existence of the outstanding interest, or that the vendor is agreeing for more than he can give, or if he proceed in the matter with notice of the defect and without insisting on it, no abatement of purchase-money will, it is conceived, be allowed; (*d*) nor will any be allowed in respect of a lease granted by the vendor, but which is void by statute; (*e*) and the omission of the purchaser to make proper inquiries before accepting the title, may preclude him from claiming compensation for some defect which, with a little more diligence, he would have discovered. Thus, where the purchaser at the date of the contract is aware that the property is in the occupation of a tenant, and makes no previous inquiry as to the nature and duration of the tenant's interest, it has been held that he is not entitled to specific performance with an abatement,

(*w*) *Balmano v. Lumley*, 1 Ves. & Bea. 224; *Paton v. Brebner*, 1 Bligh, 42, 66; *Aylett v. Ashton*, 1 Myl. & Cr. 105; *Nouaille v. Flight*, 7 Beav. 521; *Ridgway v. Gray*, 1 Mac. & G. 109, 111. See *Paul v. Young*, 2 Stockt. Ch. 401, 414.

(*x*) *Walker v. Barnes*, 3 Madd. 247; *Aylett v. Ashton*, 1 Myl. & Cr. 105; *Patterson v. Long*, 6 Beav. 598.

(*y*) *Bainbridge v. Kinnard*, 32 Beav. 346.

(*z*) 1 Sugden V. & P. (8th Am. ed.) 316, and note (*q*¹).

(*a*) *Seaman v. Vawdrey*, 16 Ves. 390; *Martin v. Cotter*, 3 J. & L. 496, 509.

(*b*) 1 Sugden V. & P. (8th Am. ed.) 312.

(*c*) *Peacock v. Penson*, 11 Beav. 355.

(*d*) See *Lawrenson v. Butler*, 1 Sch. & Lef. 13, 19; *Harnett v. Yielding*, 2 Sch. & Lef. 549, 560; *Nelthorpe v. Holgate*, 1 Coll. 203, 215.

(*e*) *Morris v. Preston*, 7 Ves. 557.

[on the ground that the property is subject to an undisclosed lease. (*f*)

It may occasionally happen that the vendor's interest is found to exceed that which he contracted to sell; in which case he must, as a general rule, make good the latter to the best of his ability; for instance, where a vendor, in fact seised in fee, contracted to sell the estate as copyhold, stating it to be equal in value to freehold, it was held that he ought (but for other grounds of defence) to have conveyed the freehold. (*g*) It has, however, been held, that on an agreement to assign a lease, equity cannot decree an underlease, although the assignment would induce a forfeiture; since the vendor's motive to the assignment may have been to escape the rent and covenants; (*h*) but the defence, as Lord St. Leonards remarks, is one which could seldom be set up by a vendor. (*i*)

Vendor, how far bound to make good interests contracted for, out of his own higher interest.

If the purchaser be unwilling to complete with an abatement, he may resist specific performance (*k*) on the ground of the tenure of the property, or of a material part of it, varying from that to which he is entitled under the contract; *e. g.* he will not be compelled to take a term (even for four thousand years), (*l*) or a copyhold (*m*) for a freehold, or mere sheep-walks for a freehold. (*n*)

Want of title, where a defence for purchaser declining abatement.

When estate is of different tenure;

So, also, the purchaser may resist specific performance on the ground of the property being held in a manner different from that which is expressed or implied in the contract; *e. g.* he will not be compelled to take an assignment of an underlease, instead of an original lease; (*o*) or of a redeemable

or, held in different manner;

(*f*) *James v. Lichfield*, L. R. 9 Eq. 51, *sed quere*. See, also, *Edwards-Wood v. Marjoribanks*, 3 De G. & J. 329; 7 H. L. Cas. 806; *Clermont v. Tasburgh*, 1 Jac. & W. 112.

(*g*) *Twining v. Morrice*, 2 Bro. C. C. 331.

(*h*) *Anon.* 1 Sugden, V. & P. 301; and see, and consider, *Bartlett v. Salmon*, 1 Jur. N. S. 277; 6 De G., M. & G. 33.

(*i*) 1 Sugden V. & P. 301.

(*k*) If he rely on want of title as a defence he should not file a cross-bill to have the contract rescinded. *Hilton v. Barrow*, 1 Ves. jr. 284.

(*l*) *Drewe v. Corp.*, 9 Ves. 368; and *Fordyce v. Ford*, 4 Bro. C. C. 494, cited 13 Ves. 78; and *Wright v. Howard*, 1 Sim. & Stu. 190.

(*m*) *Twining v. Morrice*, 2 Bro. C. C. 331; *Hick v. Phillips*, Prec. Ch. 575; 1 Sugden V. & P. 303; *Ayles v. Cox*, 16 Beav. 23.

(*n*) *Vancouver v. Bliss*, 11 Ves. 458, 466.

(*o*) *Madeley v. Booth*, 2 De G. & S. 718; 1 Sugden V. & P. 300. See *Hayford v. Criddle*, 22 Beav. 480.

[instead of an absolute interest ; (*p*) or, on the ground of no title being shown to that extent of interest which he contracted for ; *e. g.* he cannot be compelled to take, instead of an estate in possession, a reversion expectant on a life estate ; (*q*) nor, having contracted for the entirety, can he be compelled to take undivided parts of the estate, (*r*) even although the vendors were tenants in common of the entirety ; (*s*) and the same decision has been come to, where, on a contract for two sevenths of an estate, a title could only be made to one seventh ; (*t*) nor can he, on the purchase of a leasehold interest, be compelled to accept a term "considerably less" (*u*) than that contracted for ; *e. g.* a term for six instead of sixteen years ; (*v*) nor, it would seem, a term falling only a little short of the term contracted for, as a term of twenty years and a quarter instead of twenty-one years. (*w*) Or on the ground of no title being shown to a material part of the estate ; such materiality consisting, either in the proportion which such part bears to the entirety, or in its being important with regard to the enjoyment of the residue, or as possessing an adventitious value in the estimation of the purchaser ; (*x*) *e. g.* "a purchaser cannot be compelled to take compensation for a large portion of the estate ;" (*y*) as, where the property was stated to contain 753 square yards or thereabouts, but in fact containing only 573 square yards. (*z*) Nor, having entered into a single contract for two estates, could he probably be compelled to take one without the other ; (*a*) so, where, on the purchase of a mansion and 700 acres, the title to 12 acres proved defective, such 12 acres being

or no title shown to extent of interest contracted for ;

or no title shown to material part of estate ;

or to one of two estates included in a single contract ;

(*p*) *Coverley v. Burrell*, 1 Sugden V. & P. (8th Am. ed.) 299. See, also, for other cases, *Stewart v. Alliston*, 1 Meriv. 26 ; *Langford v. Selmes*, 3 K. & J. 220 ; *Smith v. Watts*, 4 Drew. 338.

(*q*) *Collier v. Jenkins*, You. 295 ; *Hughes v. Jones*, 3 De G., F. & J. 301 ; 8 Jur. N. S. 399. See, also, *Lincham v. Cotter*, 7 Ir. Eq. 176 ; 1 Sugden V. & P. 304, 308.

(*r*) *Dalby v. Pullen*, 3 Sim. 29 ; affirmed, 1 Russ. & M. 296. See *Price v. Griffith*, 1 De G., M. & G. 80.

(*s*) *Attorney General v. Day*, 1 Ves. 218, 224.

(*t*) *Roffey v. Shallcross*, 4 Madd. 227, cited 2 Myl. & K. 726.

(*u*) 1 Sugden V. & P. 299. See *Mort-*

lock v. Buller, 10 Ves. 306 ; *Halsey v. Grant*, 13 Ves. 77, 78 ; *Vignolles v. Bowen*, 12 Ir. Eq. 194, 198.

(*v*) *Long v. Fletcher*, 2 Eq. Cas. Abr. 5.

(*w*) *Forrer v. Nash*, 35 Beav. 167, *sed quare*.

(*x*) See 1 Madd. 167 ; *Halsey v. Grant*, 13 Ves. 79 ; *Magennis v. Fallon*, 2 Moll. 588 ; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. R. 534, 573.

(*y*) 1 Sugden V. & P. 316.

(*z*) *Whittemore v. Whittemore*, L. R. 8 Eq. 603.

(*a*) See *Prendergast v. Eyre*, 2 Hag. 81, 94 ; 1 Sugden V. & P. 313, 315, *sed quare*.

[opposite the park gates and containing brick earth, which rendered it probable that they might be built upon, the purchaser was held free; (*b*) so, also, where, on the purchase of a wharf and jetty, no title could be made to the jetty; (*c*) so, where no title could be made to a strip of land forming the frontage to the highway. (*d*) Or on the ground of the existence of incumbrances or liabilities which would interfere with the enjoyment of the estate; *e. g.* liabilities to rights of mining, (*e*) common, (*f*) or water-way with power of entry for the purpose of making, opening, or cleansing water-courses, or to rights of entry for making reservoirs, or of planting ladders for the repair of adjoining houses; or to a right of sporting, (*g*) or to the repairs of the chancel of a church, (*h*) or to quit-rents or rent-charges, if of a large amount, (*i*) or to keep up the fences, water-courses, &c., upon the land itself, (*k*) have been held to be defects which do not admit of compensation. (*l*)

or where incumbrances or liabilities exist which would affect its enjoyment;

Upon a similar principle it has been held, at law, that a purchaser having contracted for the assignment of a subsisting lease, cannot be required to accept a new lease as original lessee; his liability being greater under the lease than it would be under the assignment. (*m*) So, where, on the purchase of leaseholds, the lease was found to contain covenants to build additional houses, and to deliver them up at the end of the term, and the houses had not been built, but the covenant to build had been waived, it was held that the liability under the cov-

or matters exist which increase proposed liability of purchaser;

(*b*) *Knatchbull v. Grueber*, 1 Madd. 153; 3 Meriv. 124, 141; and see 2 Myl. & K. 728.

(*c*) *Peers v. Lambert*, 7 Beav. 546; and see *Halsey v. Grant*, 13 Ves. 78; *Drewe v. Hanson*, 6 Ves. 678; 1 Sugden V. & P. 316.

(*d*) *Perkins v. Ede*, 16 Beav. 193.

(*e*) See *Seaman v. Vawdrey*, 16 Ves. 390; *Martin v. Cotter*, 3 J. & L.; 496, 509; *Hayford v. Criddle*, 22 Beav. 480; *Ramsden v. Hirst*, 4 Jur. N. S. 200; *Kerr v. Pawson*, 25 Beav. 394; *Pretty v. Solly*, 26 Beav. 606.

(*f*) See *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

(*g*) See *Burnell v. Brown*, 1 Jac. & W. 172; 1 Sugden V. & P. 311.

(*h*) *Fortblow v. Shirley*, cited 2 Swanst. 223.

(*i*) *Portman v. Mill*, 1 Russ. & M. 696.

(*k*) *Larkin v. Lord Rosse*, 10 Ir. Eq. 70; See *Edwards-Wood v. Marjoribanks*, 1 Giff. 384; 3 De G. & J. 329; 7 H. L. Cas. 806.

(*l*) Where it is a part of the agreement to convey a house, that it shall be cleared of a tenant by a certain day, the same on which the purchase-money was agreed to be paid, if the tenant unlawfully continues in possession after that day, the vendor cannot enforce specific performance. *Howe v. Conley*, 16 Gray, 552.

(*m*) *Mason v. Corder*, 2 Marsh. 332. See 1 Sugden V. & P. 300; *Darlington v. Hamilton, Kay*, 558; *Bartlett v. Salmon*, 1 Jur. N. S. 277; 6 De G., M. & G. 33; *Hayford v. Criddle*, 22 Beav. 477.

[enant to deliver up at the end of the term was a sufficient defence to the suit; although such liability might have been escaped by assigning the term to a pauper even only a day before its termination. (*n*)

Where only part of an estate is affected by a liability which, if affecting the entirety, would enable the purchaser to resist specific performance, the purchaser's right to avoid the contract would seem to depend upon whether the part so affected is material to the enjoyment of the residue. Where the part so affected is not material to such enjoyment, and is not the purchaser's principal object in purchasing, he may, it seems, be compelled to take the remainder of the land at a proportionate price; but, in such a case, there will be a reference to chambers to inquire as to the materiality of the part to which a title cannot be made. (*o*)

Where, on the purchase of several lots by the same person, the title to one or more proves defective, this may or may not, according to circumstances, be a ground for the purchaser's resisting specific performance in respect of the remaining lots. An express agreement, that the purchaser shall not take any unless he can have all, will be sufficient to blend the whole into one contract; "but the same complication may be effected, or rather evidenced, without any such agreement. It is a question of circumstances; the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion by the party, a mere statement of his inclination or fancy, will not be sufficient; nor may the proof of anything of a private nature, not known to the vendor, suffice; but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all." (*p*)

(*n*) *Nouaille v. Flight*, 7 Beav. 521.

(*o*) 1 *Sugden V. & P.* (8th Am. ed.) 315. See *Buck v. M'Caughtry*, 5 Monroe, 230; *Pratt v. Law*, 9 Cranch, 458; *Simpson v. Hawkins*, 1 Dana, 305; *Collard v. Groom*, 2 J. J. Marsh. 488.

(*p*) Per Lord Brougham, *Casa Major v. Strode*, 3 Myl. & Cr. 725; *Poole v. Shergold*, 2 Br. C. C. 118; Lord Eldon's remarks, in *Drewe v. Hanson*, 6 Ves. 675, as stated 1 *Sugden V. & P.* 320; *Lewin v. Guest*, 1 Russ. 325.

[A purchaser will lose his right to resist specific performance, and his right to compensation or abatement, (*q*) on the ground of the estate being of a different tenure, (*r*) or subject to a liability affecting its beneficial enjoyment (*e. g.* a right of sporting), (*s*) or of there being no title to a material part of it, (*t*) or of a variation from the description in the particulars (*u*), if, at the time of entering into the contract, he had, or by using due diligence might have had, knowledge of the defect; (*v*) or if, after having become acquainted with it, he, without insisting thereon, proceed in the treaty; (*w*) or, *à fortiori*, take possession; (*x*) so if, although insisting on the objection, he take possession and endeavor to prevent the vendor from removing the defect, or even proceed in the treaty, he may be compelled to complete with an abatement; (*y*) so, where a railway company agreed to buy from a tenant for life an estate not within their special act, and to procure an act enabling him to convey the fee, which they failed to do, they were ordered to pay the entire purchase-money into court upon his conveying his life estate. (*y*¹)

Benefit of defence, how lost to purchaser.

(*q*) See *Horner v. Williams*, 1 J. & C. 274.

(*r*) *Fordyce v. Ford*, 4 Bro. C. C. 494.

(*s*) *Burnell v. Brown*, 1 Jac. & W. 168.

(*t*) See *Drewe v. Hanson*, 6 Ves. 679; *Martin v. Cotter*, 3 J. & L. 508.

(*u*) *Dyer v. Hargrave*, 10 Ves. 505, 508.

(*v*) *James v. Lichfield*, L. R. 9 Eq. 51. There may be specific performance, although the description of the property, the subject of the contract, be incorrect, if it appear that the purchaser knew at the time of the purchase that the representation was untrue, or inspected the property before making the purchase, and so acted upon his own judgment in the matter; *Dyer v. Hargrave*, 10 Ves. 505; *Grant v. Munt*, Coop. 177; *Lord Brooke v. Roundthwaite*, 5 Hare, 306; *Haywood v. Cope*, 25 Beav. 140; *Clarke v. Mackintosh*, 4 Giff. 134; *Henderson v. Hudson*, 15 W. R. 860; or if there were circumstances in the case which demanded further investigation, for which the vendor afforded every facility; *Clarke v. Mackintosh*, 4 Giff. 134; or if the representations which have been made are vague in their terms,

and merely amount to a statement of value or opinion. *Scott v. Hanson*, 1 Russ. & M. 128; *Johnson v. Smart*, 2 Giff. 151.

(*w*) *Fordyce v. Ford*, 4 Bro. C. C. 498; *Drewe v. Hanson*, 6 Ves. 675, 679; *Dyer v. Hargrave*, 10 Ves. 508; *Kingsley v. Young*, 17 Ves. 468; 18 Ves. 207; *Farebrother v. Gibson*, 1 De G. & J. 602; *Craddock v. Shirley*, 3 Marsh. 288; *Roach v. Rutherford*, 4 Desaus. 126.

(*x*) *Burnell v. Brown*, 1 Jac. & W. 168.

(*y*) See *Calcraft v. Roebuck*, 1 Ves. jr. 221. Where a purchaser of land was let into possession, and paid a part of the purchase-money under the contract, but being sued by the vendor for the balance of the purchase-money, he defended on the ground that the contract was void by the statute of frauds, and so defeated the action; it was held that the purchaser, having thus disaffirmed and abandoned the contract, was not entitled to a specific execution of it. *Payne v. Graves*, 5 Leigh, 561.

(*y*¹) *Hawkes v. Eastern Counties Railway Co.* 3 De G. & S. 743; 1 De G., M. & G. 737; 5 H. L. Cas. 331.

[And a purchaser has not been allowed to resist specific performance, on the ground that the estate having been sold with what was represented in general terms as an unlimited right of common, the same proves to be a right of common only for sheep; (*z*) or on the ground of the estate being subject to quit-rents or rent-charges of small amount; (*a*) or, of a slight misdescription of the vendor's interest on a sale of leaseholds, (*b*) or quit-rents, (*c*) or of a want of title to immaterial (*d*) portions of the estate.

So, the circumstance of the estate being subject to a foot-way over and round it, has been held to be no defence to a suit for specific performance; its existence being patent, and the purchaser having made no inquiry on the subject. (*e*) But the decision has not been generally approved; and the courts would probably, upon slight grounds, come to a different decision, in any case where an estate was subject to a right of way which materially affected its enjoyment. (*e*¹)

A purchaser will not be compelled to take a doubtful title; (*f*)

(*z*) *Howland v. Norris*, 1 Cox, 59.

(*a*) See *Esdaile v. Stephenson*, 1 Sim. & Stu. 122; *Portman v. Mill*, 1 Russ. & M. 696; *Wood v. Bernal*, 19 Ves. 221; *Pren-dergast v. Eyre*, 2 Hog. 81, 94; 1 *Sugden V. & P.* (8th Am. ed.) 313; *Gans v. Renshaw*, 2 Barr, 34; *Ten Broeck v. Livingston*, 1 John. Ch. 357; *Winne v. Reynolds*, 6 Paige, 407.

(*b*) See *Forrer v. Nash*, 35 Beav. 167.

(*c*) *Cuthbert v. Baker*, 1 *Sugden V. & P.* 313.

(*d*) *M'Queen v. Farquhar*, 11 Ves. 467; *Bowyer v. Bright*, 13 Price, 698, 704; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. R. 573; 1 *Sugden V. & P.* (8th Am. ed.) 315, and note (*h*), 316, and notes (*g*) and (*g*¹).

(*e*) *Oldfield or Bowles v. Round*, 5 Ves. 508; and see *Davies v. Sear*, L. R. 7 Eq. 429.

(*e*¹) See 1 *Sugden V. & P.* 328; but see also, *contra*, *Martin v. Cotter*, 3 J. & L. 506.

(*f*) *Shapland v. Smith*, 1 Bro. C. C. 75; *Vancouver v. Bliss*, 11 Ves. 458, 465; *Sloper v. Fish*, 2 Ves. & Bea. 145; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559, 569; *Earl of Lincoln v. Arce-deckne*, 1 Coll. 98; *Bloss v. Lord Clam-morris*, 3 Bligh, 62; *Howarth v. Smith*, 6 Sim. 161; *Collier v. M'Bean*, L. R. 1 Ch. Ap. 81; *Collard v. Sampson*, 4 De G., M. & G. 224 (Am. ed.), note (1); *Smith v. Child*, W. N. (Dec. 17, 1870) 257, V. C. S.; *Richmond v. Gray*, 3 Allen, 27; *Sturtevant v. Jaques*, 14 Allen, 523; *Park v. Johnson*, 7 Allen, 383; *Young v. Rathbone*, 1 C. E. Greene, 224; *Sohier v. Williams*, 1 Curtis C. C. 479; *Swayne v. Lyon*, 67 Penn. St. 436, 439; *Ludwick v. Huntzinger*, 5 Watts & S. 51; *Speakman v. Forepaugh*, 44 Penn. St. 363; *Colwell v. Hamilton*, 10 Watts, 413; *Griffin v. Cunningham*, 19 Grattan, 571; *Mullins v. Trinder*, L. R. 10 Eq. 449; 1 *Sugden V. & P.* (8th Am. ed.), 386, note (*d*), and cases cited, 405, and cases stated in note (1).

[or a merely equitable title, (*g*) unless the sale be under a decree of the court; (*h*) although he may have consented to go before the master upon a reference as to the title to the estate directed in an administration suit; (*i*) nor will he be compelled to take an equitable title which his vendor, who purchased from the court, was himself obliged to accept; (*k*) nor, without his consent, would a case have been sent for the opinion of a court of law; (*l*) nor will an inquiry be directed as to a doubtful matter of fact; (*m*) for in neither case would adverse claimants be bound by the result; (*n*) and if upon the return of a certificate from a court of law in favor of the title, the court had any doubt upon the point, a case would have been directed to another court of law, (*o*) and notwithstanding such certificate, the court of chancery will entertain any equitable objection to the title, (*p*) and may refuse to enforce specific performance. (*q*)

Purchaser need not accept doubtful or merely equitable title;

or consent to a case being sent to law.

The doubt, whether upon law or fact, must, in order to be a ground for rejecting the title, be a "grave and reasonable doubt;" (*r*) and, as respects a question of law, must be founded on the present state of the authorities. (*s*) According to Lord Hardwicke, "the court, in carrying agreements into execution, must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title; there are often suggestions of old entails, and even doubts of what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate," (*t*) and

Doubt must be a reasonable one.

(*g*) Howarth *v.* Smith, 6 Sim. 161; Abel *v.* Heathcote, 2 Ves. jr. 100; Law *v.* Urlwin, 1 Sim. 377; Littlefield *v.* Tinsley, 26 Texas, 353; Jones *v.* Taylor, 7 Texas, 240; Waggener *v.* Waggener, 3 Monroe, 556; Ragan *v.* Gaither, 11 Gill & J. 472; Freeland *v.* Pearson, L. R. 7 Eq. 246.

(*h*) See Else *v.* Else, L. R. 13 Eq. 196, as to a sale under decree of court not enforced on account of defect in title. See Christian *v.* Cabell, 22 Grattan, 97.

(*i*) Cann *v.* Cann, 1 Sim. & Stu. 284.

(*k*) Lord Waltham's case, 1 Sugden V. & P. (8th Am. ed.) 397.

(*l*) Roade *v.* Kidd, 5 Ves. 647.

(*m*) See Pyrke *v.* Waddingham, 10 Hare, 11.

(*n*) See Pyrke *v.* Waddingham, 10 Hare, 11.

(*o*) See Trent *v.* Hanning, 10 Ves. 500; 1 Sugden V. & P. (8th Am. ed.) 386.

(*p*) Sheffield *v.* Lord Mulgrave, 2 Ves. jr. 526.

(*q*) Morrison *v.* Barrow, 1 De G., F. & J. 633.

(*r*) See 1 Coll. 102.

(*s*) See Eno *v.* Eno, 6 Hare, 177.

(*t*) Lyddal *v.* Weston, 2 Atk. 20.

[the above remarks are cited with approbation by Sir W. Grant. (*u*) However, in a case before Mr. Baron Alderson, upon the above dicta as to moral and mathematical certainties being cited, the court observed, "that only means that you cannot prove a title by means of reasoning, but only with the help of evidence; those sort of apothegms get a great deal more reputation than they deserve." (*v*)

As to doubts depending on a point of law, Lord St. Leonards suggests, that a judge "may feel himself more at liberty to decide a general point of law between vendor and purchaser than a question of construction of an informal instrument, which can afford no precedent, and upon which men may generally differ;" (*w*) and even an abstract point of law will not, if considered doubtful, be decided against a purchaser even by the House of Lords; (*x*) and where the purchaser objected to the title upon the authority of a decision of a court of law in a similar case, the court of chancery, although entertaining a strong opinion against the correctness of such decision, would not have overruled it, without first directing a case. (*y*) So, the test as to whether a title is doubtful or not, as between vendor and purchaser, has been held to be the certain conviction of the court in deciding the point that no other judge would take a different view. (*z*) In one case the master of the rolls stated it to be his opinion, that where the title depends upon a question of law, it is the duty of the court to decide it; and that it is a reproach to the law for the court to declare itself unable to decide it. (*a*)

Decision of
court below,
if reversed
on appeal,
does not ren-
der title
doubtful.

If there be an appeal, the fact of the title having been held bad in the courts below will not be a reason for the judge of the appellate court considering the title too doubtful to force on a purchaser, if he himself entertain a clear opinion in its favor. (*b*)

(*u*) *Hillary v. Waller*, 12 Ves. 252; 1 Sugden V. & P. 392.

(*v*) *Hutchinson v. Morritt*, 3 You. & Col. 554.

(*w*) 1 Sugden V. & P. (8th Am. ed.) 387; *Pyrke v. Waddingham*, 10 Hare, 1; but see, also, *Minet v. Leman*, 1 Jur. N. S. 411; 20 Beav. 269; 7 De G., M. & G. 340.

(*x*) *Blosse v. Lord Clanmorris*, 3 Bligh, 62, 71.

(*y*) *Peppercorn v. Peacock*, 4 Jur. 1122; *Burke v. Annis*, 11 Hare, 232, 237.

(*z*) *Rogers v. Waterhouse*, 4 Drew. 329; but see now, *Beioley v. Carter*, L. R. 4 Ch. Ap. 230.

(*a*) *Minet v. Leman*, 1 Jur. N. S. 411; 20 Beav. 269; 7 De G., M. & G. 340; but see *Pyrke v. Waddingham*, 10 Hare, 11.

(*b*) *Beioley v. Carter*, L. R. 4 Ch. Ap. 230; 1 Sugden V. & P. (8th Am. ed.) 386, and note (*e*); *Mullins v. Trinder*, 18 W. R. 1186; L. R. 10 Eq. 449; 39 L. J. Ch. 833. See *Biscoe v. Wilks*, 3 Meriv. 456; *Collier v. McBean*, L. R. 1 Ch. Ap.

[The fact that one of the conveyancing counsel of the court has expressed an opinion adverse to the title, is *à fortiori* not sufficient to make it doubtful in the judgment of the court. (c)]

In a case where it appeared that, upon a previous purchase, a tenant for life had, after the contract, exercised a power of appointment in favor of one of his sons; and that the father, mother, and son, had thereupon conveyed to the purchaser, the money being expressed to be paid to the three conveying parties, Lord Eldon held that the mere possibility of the appointment having been founded on a corrupt agreement between the father and the son was not a valid objection to the title. (d) So, where there was a clear intention to exercise the power, but the instrument exercising it contained only an indirect reference to the instrument creating the power, and there had been previous fraudulent executions, the title was forced on the purchaser. (e) Where the vendor claimed by purchase from his son, the consideration being an annuity and the release of a debt, the purchaser was held entitled to evidence not only of the debt being due, but of the fairness of the transaction. (f)

As to doubts respecting facts. Title not considered doubtful on mere suspicion of fraud.

Even the mere fact that a suit is pending, in which part of the lands is claimed adversely to the vendor, is not, in itself, an absolute objection to the title; and in such a case, upon a reference under the old practice, the master should have stated the point in question in the adverse suit, and his opinion thereon. (g) The court, however, it is conceived, would not, unless the point were perfectly clear, or, perhaps, in any case, compel the purchaser to complete until the adverse claim had been decided on. (h)

Pendency of adverse suit no ground for certifying against title.

In a modern case, (i) where the vendor's title depended upon

81; per Lord St. Leonards in Sheppard v. Doolan, 3 D. & War. 8; Alexander v. Mills, L. R. 6 Ch. Ap. 132.

(c) Hamilton v. Buckmaster, L. R. 3 Eq. 323; Dalzell v. Crawford, 1 Parsons Eq. 57.

(d) M'Queen v. Farquhar, 11 Ves. 467.

(e) Carver v. Richards, 27 Beav. 488; 3 De G., F. & J. 548.

(f) Boswell v. Mendham, 6 Mad. 373.

(g) Osbaldeston v. Askew, 1 Russ. 160. See Devy v. Thornton, 9 Hare, 229.

(h) See Bentley v. Craven, 17 Beav. 204;

Green v. Pulsford, 2 Beav. 75; Grove v. Bastard, 2 Phil. 619; S. C. 1 De G., M. & G. 19; McCulloch v. Gregory, 2 Jur. N. S. 1134; 3 K. & J. 12; 1 Sugden V. & P. (8th Am. ed.) 393; Lyddal v. Weston, 2 Atk. 19; Flower v. Hartopp, 6 Beav. 476; Martin v. Cotter, 3 J. & L. 509; Stewart v. Marquis of Conyngham, 1 Ir. Ch. Rep. 434; Ramsden v. Hirst, 4 Jur. N. S. 200.

(i) Pyrke v. Waddingham, 10 Hare, 1; and see Freer v. Hesse, 4 De G., M. & G. 495. See, also, Minet v. Leman, 20 Beav. 269; 7 De G., M. & G. 340; Rogers v.

the construction of limitations in a will, the court, although expressing its opinion in favor of the title, refused to enforce specific performance. After recognizing the right of every purchaser to require a marketable title, that is to say, a title which, so far as its antecedents are concerned, may at all times and under all circumstances be forced on an unwilling purchaser, the court observed, that in those cases it is its duty not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be; that this is the true rule to be applied in such cases, is the more apparent from the repeated decisions, that the court will not compel a purchaser to take a title which will expose him to litigation or hazard. (*k*) If doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled; enforcing performance in the one case, and refusing to enforce it in the other. (*l*) If the doubt arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must of course be refused; and even though the court may lean in favor of the title, its duty is, either to consider whether it would trust its own money upon it, or at least to weigh whether the doubt is so reasonable and fair, that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused. (*m*) In the cases of *Rushton v. Craven*, (*n*) *Chorlton v. Cravan*, (*o*) and *Clermont v. Whitaker*, (*p*) where the court enforced specific performance, its own opinion had been fortified by the opinion of a court of law; and it could not be univer-

Remarks on doubtful title in *Pyrke v. Waddingham*.

Waterhouse, 4 Drew. 329; but see now *Beioley v. Carter*, L. R. 4 Ch. Ap. 230; *Alexander v. Mills*, L. R. 6 Ch. Ap. 132.

(*k*) *Sturtevant v. Jaques*, 14 Allen, 523, 526; *Richmond v. Gray*, 3 Allen, 25; *Griffin v. Cunningham*, 19 Grattan, 571; *Speakman v. Forepaugh*, 44 Penn. St. 363; *Colwell v. Hamilton*, 10 Watts, 413. The purchaser is entitled to a marketable title. A title which exposes him to litigation is not so. *Swayne v. Lyon*, 67 Penn. St. 436. See *Christian v. Cabell*, 22 Grattan, 104.

(*l*) 1 Sugden V. & P. (8th Am. ed.)

386; *Collard v. Sampson*, 4 De G., M. & G. 224; *Radford v. Willis*, L. R. 7 Ch. Ap. 7.

(*m*) Although in many cases a purchaser with notice may safely purchase from one who bought without notice, yet the title would not be forced on the second purchaser, as he would have to incur the risk of notice being proved. *Freer v. Hesse*, 4 De G., M. & G. 495.

(*n*) 12 Price, 599. See Sugden, 392

(*o*) 12 Price, 619.

(*p*) 2 Jarman Wills (3d Eng. ed.) 435.

[sally held that, because the court is of opinion in favor of the title, a purchaser is to be compelled to accept it; each must depend upon the nature of the objection, and the weight which the court may be disposed to attach to it; and, in determining whether specific performance is to be enforced or not, it must not be lost sight of, that the exercise by the court of its jurisdiction in cases of specific performance is discretionary, and that it has no means of binding the question as against adverse claimants, or of indemnifying the purchaser if its own opinion should ultimately turn out not to be well founded. And after stating that its own opinion was much in favor of the title, the court went on to remark, that it was unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy it that other competent persons might not entertain a different opinion; or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard. Upon these grounds, therefore, it was of opinion that specific performance ought not to be decreed. And it refused to direct a case for a court of law, observing the rule of the court to be, that it will not against a purchaser send a case upon a doubtful question of law any more than it will direct an inquiry upon a doubtful question of fact, and for the same reason, viz. that adverse claimants would not be bound by the result. (*q*)

As to the fifth of the above heads. The amount of the consideration to be paid may be a ground of defence by either party; and its inadequacy, or excess, will, of course, be determined with reference to matters as existing at the date of the contract, irrespectively of subsequent events. (*r*) Inadequacy of consideration is not, however, a defence available to the vendor of an estate in possession, (*s*) unless it can be shown to have originated in fraud, surprise, or misrepresentation (whether wilful or not), (*t*) or improper

5th. Matters relating to consideration.

Inadequacy of, when a vendor's defence.

(*q*) In *Mullins v. Trinder*, L. R. 10 Eq. 449, the principles laid down in *Pyrke v. Waddingham*, 10 Hare, 1, were approved of, but the decision was not followed under precisely similar circumstances. For collections of cases in which titles have been held good, bad, or doubtful, see 1 Sugden V. & P. (8th Am. ed.) 389, note (1), 405, note (1).

(*r*) See 1 Sugden V. & P. (8th Am. ed.)

273, and note (*k*), 275, and note (*a*); *Poole v. Shergold*, 2 Bro. C. C. 118, 119; *Coles v. Trecothick*, 9 Ves. 246; *Ambrouse v. Keller*, 22 Grattan, 769. *

(*s*) *Coles v. Trecothick*, 9 Ves. 246; *Burrowes v. Lock*, 10 Ves. 470; *Lowther v. Lowther*, 13 Ves. 103; *Borell v. Dana*, 2 Hare, 450.

(*t*) *Wall v. Stubbs*, 1 Madd. 81; *Brea-ley v. Collins*, You. 317; *Park v. Johnson*,

[concealment on the part of the purchaser, (*u*) or in advantage taken of the distress of the vendor; (*v*) or, according to Lord Eldon, "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction;" (*w*) but this dictum would probably at the present day be hardly sustained in its full extent; (*x*) or unless the vendor be a trustee for sale; (*y*) but even in the case of a trustee the court will enforce against him an agreement to sell at a fair specified price, although a much larger sum may have been subsequently offered and accepted. (*z*)

The distinction which for a long time existed between the purchase of an estate in possession, and of a reversionary interest, as respects mere inadequacy of price being an available defence for the vendor, has been removed in England by a recent statute, which provides that no purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, is for the future to be opened or set aside, merely on the ground of undervalue. (*a*) But as in the case of an interest in possession, so *à fortiori* in the case of a reversionary interest, if the value is capable of estimation, and the price paid is so grossly inadequate as to be in itself evidence of fraud, this may be a sufficient defence to the purchaser's suit for specific performance. And a degree of inadequacy, which would be insufficient to induce the court to interfere and set aside an executed contract, may be a valid defence in a suit for specific per-

4 Allen, 259, 266, 267; Talley *v.* Robinson, 22 Grattan, 888; Callaghan *v.* Callaghan, 8 Cl. & Fin. 374, note (3); Robinson *v.* Robinson, 4 Md. Ch. 182, 183; Powers *v.* Hale, 25 N. H. 145; Seymour *v.* Delancy, 6 John. Ch. 222; but see Powers *v.* Mayo, 97 Mass. 180.

(*u*) See cases cited in note (*s*) above; also White *v.* Damon, 7 Ves. 30; Western *v.* Russell, 3 Ves. & Bea. 187; Deane *v.* Rastron, 1 Anst. 64; Cadman *v.* Horner, 18 Ves. 10; Turner *v.* Harvey, Jac. 169; Wall *v.* Stubbs, 1 Madd. 80; Lukey *v.* O'Donnel, 2 Sch. & Lef. 471; 1 Sugden V. & P. (8th Am. ed.) 273, and note (*k*), 275, and note (*a*); Eastman *v.* Plumer, 46 N. H. 478, 479; Lee *v.* Kirby, 104 Mass. 420, 428. See, too, Falcke *v.* Gray, 4

Drew, 651, where the court refused specific performance of a contract to sell articles of *vertu*, on the ground that the purchaser was well acquainted with their value, while the vendor was wholly ignorant of it. See Davis *v.* Parker, 14 Allen, 94.

(*v*) See Martin *v.* Mitchell, 2 Jac. & W. 413, 423.

(*w*) Coles *v.* Trecothick, 9 Ves. 246.

(*x*) See 1 Sugden V. & P. (8th Am. ed.) 273, and note (*k*), 275; Vigers *v.* Pike, 8 Cl. & Fin. 645.

(*y*) Goodwin *v.* Fielding, 4 De G., M. & G. 90.

(*z*) Goodwin *v.* Fielding, 4 De G., M. & G. 90.

(*a*) 31 Vict. c. 4; 1 Sugden V. & P. (8th Am. ed.), 277, note (*y*).

[formance; (*b*) especially if the contract has not been acted on or attempted to be enforced, until the reversion has fallen into possession. (*c*)

The fact of the sale being by auction, although not absolutely conclusive, (*d*) much increases the difficulty of showing fraudulent inadequacy, (*e*) and the fact of neither party being aware of the value of the estate at the time of the contract, seems to render such a defence impracticable; as in a case where a person sold, for what proved to be one tenth only of its real value, the allotment to which he might be entitled under an expected inclosure award. (*f*)

Where the estate is sold for a contingent consideration, *e. g.* a life annuity, the occurrence of the contingency which determines the consideration, is, in general, no defence to the purchaser's suit for specific performance. (*g*)

So, on the other hand, it has been held that the mere excessive (*h*) amount of the purchase-money (even although not attributable to fraud, misrepresentation, or concealment on the part of the vendor), (*i*) is a defence avail-

Sale by auction;

sale of ascertained interest;

Failure of contingent consideration, in general no defence.

Excess of purchase-money, when a purchaser's defence.

(*b*) See *Ryle v. Swindells*, M'Clel. 519; *Playford v. Playford*, 4 Hare, 546; *Vigers v. Pike*, 8 Cl. & Fin. 645; 1 *Sugden V. & P.* (8th Am. ed.) 276, and cases in note (*l*); 1 *Story Eq. Jur.* § 336; *Edwards v. Burt*, 2 De G., M. & G. (Am. ed.), 55, note (1); *Osgood v. Franklin*, 2 John. Ch. 1.

(*c*) *Playford v. Playford*, 4 Hare, 546.

(*d*) *Collet v. Woollaston*, 3 Bro. C. C. 228.

(*e*) *White v. Damon*, 7 Ves. 30, 35; *Ex parte Latham*, 7 Ves. 35, note; *Ord v. Noel*, 5 Madd. 440; *Borell v. Dann*, 2 Hare, 450.

(*f*) *Anon.* cited 6 Ves. 24; and see *Knight v. Marjoribanks*, 11 Beav. 322; affirmed, 2 Mac. & G. 10. Whether the question of inadequacy is excluded when the consideration is uncertain in amount, see 1 *Sugden V. & P.* (8th Am. ed.) 273; *Pope v. Roots*, 7 Bros. P. C. 184; *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 605; *Bower v. Cooper*, 2 Hare, 408; *Kenney v. Wenham*, 6 Madd. 355; *Coles v. Trecothick*, 9 Ves. 246; per Lord Cottenham, in *Davies v. Cooper*, 5 Myl. & Cr. 279; *Strickland v. Turner*, 7 Exch. 208; *Hastie v. Couturier*, 9 Exch. 109.

(*g*) See *Mortimer v. Capper*, 1 Bro. C. C. 156; *Baldwin v. Boulter*, cited *Coles v. Trecothick*, 9 Ves. 234, 246; 1 *Sugden V. & P.* (8th Am. ed.) 295; *Davies v. Cooper*, 5 Myl. & Cr. 270; *Jackson v. Lever*, 3 Bro. C. C. 605.

(*h*) At the date of the contract, see *Poole v. Shergold*, 2 Bro. C. C. 119.

(*i*) Which, if proved, would of course be a bar to specific performance; *Buxton v. Lister*, 3 Atk. 386; *Shirley v. Stratton*, 1 Bro. C. C. 440. *Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution; *Buxton v. Lister*, 3 Atk. 383; *Howard v. Hopkins*, 2 Atk. 371; *Young v. Clerk*, Prec. C. 138; 1 Bal. & B. 241; *Dolman v. Nokes*, 22 Beav. 402; *Livingston v. Peru Iron Co.* 2 Paige, 390; *Warner v. Daniels*, 1 Wood. & M. 90, 108; *Conover v. Wardell*, 7 C. E. Green, 498; and even an industrious concealment, during a treaty, of the necessary repair of a

[able to a purchaser; (*k*) and Lord St. Leonards remarks, that "few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie*. (*l*)

Where the subject-matter of the contract is property of a speculative description, as, *e. g.* a mine, which may or may not turn out profitable, the excessive amount of the purchase-money can seldom be an available defence to the purchaser; (*m*) and it may be doubted whether the court ought in any case, on the mere ground of the hardship of the bargain, to withhold relief from the vendor, if the circumstances, which are relied on as constituting the hardship, may be supposed to have been present to the mind of the defendant, at the time of his entering into the contract. (*n*)

Where a contract for purchase is complicated with, and forms a subordinate part of an agreement for, a loan to the purchaser, the latter has evidently a ground of defence which does not exist in ordinary cases. (*o*)

Where the consideration moving from one party to the contract, consists of something to be done at a future time, and which the court could not enforce, it will not decree specific performance against the other party. (*p*)

When the price is to be fixed by valuation or arbitration, (*q*) the decision of the valuer, arbitrators, or umpire, is generally conclusive on the question of value; (*r*) and, in the absence of fraud or mistake, the court will not inter-

wall, to protect the estate from a river, which was a considerable out-going, has been deemed a sufficient ground to withhold the aid of equity from a vendor. *Shirley v. Stratton*, 1 Bro. C. C. 410; *Small v. Attwood*, 6 Cl. & Fin. 232.

(*k*) *Day v. Newman*, cited 10 Ves. 300; *Squire v. Baker*, 5 Vin. Abr. 549; *Abbott v. Swoeder*, 4 De G. & S. 448.

(*l*) 1 Sugden V. & P. (8th Am. ed.) 273; *Powers v. Hale*, 25 N. H. 145; *Garnett v. Macon*, 6 Call, 308; *Turner v. Clay*, 3 Bibb, 52; *Ramsay v. Brailsford*, 2 Desaus. 582.

(*m*) See *Heywood v. Cope*, 25 Beav. 140; *Ridgway v. Sneyd, Kay*, 627.

(*n*) See *Webb v. London & Portsmouth Railway Co.* 9 Hare, 140; reversed, 1 De G., M. & G. 251; *Hawkes v. Eastern Co. Railway Co.* 1 De G., M. & G. 754; 5 H. L. Cas. 331; *Ridgway v. Sneyd, Kay*, 635.

(*o*) *Cockell v. Taylor*, 15 Beav. 103.

(*p*) *Waring v. Manchester &c. Railway Co.* 7 Hare, 492; *Gervais v. Edwards*, 2 Dru. & War. 80. See *Hills v. Croll*, 2 Phil. 60; *Blackett v. Bates*, L. R. 1 Ch. Ap. 117.

(*q*) 1 Sugden V. & P. (8th Am. ed.) 287 *et seq.*

(*r*) *Belchier v. Reynolds*, 2 Lord Ken. pt. 2, 87, 91; *Emery v. Wase*, 5 Ves.

[pose on the mere ground that the price awarded is exorbitant; (*s*) but the misbehavior, or mere negligence, of the valuers, may afford grounds for the court's refusal to enforce a contract (*t*) which is not regarded with much favor. (*u*)

As to the sixth of the above heads, comprising those grounds of defence which consist of matters relating to the conduct of the plaintiff subsequent to the contract, these may be conveniently treated of with reference to —

6th. Conduct of plaintiff after contract, when a defence.

1st. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has released, expressly waived, or improperly delayed to enforce, his rights under the contract.

Release of, waiver of, or delay to enforce the contract.

2d. Cases, where the defence is, that the plaintiff has, by his conduct, in respect of the estate, or towards the other party, forfeited his rights under the contract.

Conduct of plaintiff.

3d. Cases where the defence is, that the plaintiff (whether vendor or purchaser) has already chosen his remedy, and obtained satisfaction for the alleged breach of contract.

Election of other remedy for breach of contract.

As to the first class of cases: An actual release by deed, or a mere written waiver of the contract, will, of course, be a good defence in equity; so will a mere parol waiver; (*v*) “but such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into;” (*w*) and Lord St. Leonards remarks, that “the court will look at the evidence with great jealousy;” (*x*) and has held, judicially, that there must be as

Release, waiver of, or delay to enforce the contract.

346; 8 Ves. 505, 507; 1 Sugden V. & P. (8th Am. ed.) 287.

(*s*) Collier v. Mason, 25 Beav. 200; 1 Sugden, 287.

(*t*) Collier v. Mason, 25 Beav. 200; Eads v. Williams, 4 De G., M. & G. 674; *In re Hawley*, 2 De G. & S. 33; Hopcroft v. Hickman, 2 Sim. & Stu. 130; Anderson v. Wallace, 3 Cl. & Fin. 26.

(*u*) Emery v. Wase, 5 Ves. 849.

(*v*) See Pitcairn v. Ogbourne, 2 Ves. sen. 376; Morris v. Timmins, 1 Beav.

411; Chambers v. Betty, Beat. 488; Clifford v. Kelly, 7 Ir. Ch. Rep. 333; Chubb v. Fuller, 4 Jur. N. S. 153; Cartan v. Bury, 10 Ir. Ch. Rep. 400; Homan v. Skelton, 11 Ir. Ch. Rep. 97; Boston & Maine Railroad v. Bartlett, 10 Gray, 384, 386; Dawson v. Yates, 1 Beav. 301; 1 Sugden V. & P. 167, 168.

(*w*) Per Lord Lyndhurst, in Robinson v. Page, 3 Russ. 114, 119; and Price v. Dyer, 17 Ves. 364.

(*x*) 1 Sugden V. & P. (8th Am. ed.) 168.

[clear evidence of the waiver as of the existence of a contract; (*y*) and the abandonment of the contract by one of several purchasers is no defence to a suit by his co-purchasers. (*z*) Whether a parol waiver of a written contract was a sufficient defence at law, was at one time considered doubtful; but now mere equitable defences may be availed of at law. (*a*)

We have already considered (*b*) how far time is in equity of the essence of the contract; even, however, where a clear right has once existed to enforce the contract, such right may be lost by delay in resorting to the court; *e. g.* an unexplained delay of seven years, (*c*) in another of six years, (*d*) in another of four years and eight months, (*e*) and in another of three years, (*f*) in filing the bill, has in itself been considered a sufficient answer to the suit; (*g*) where the bill was filed within fourteen months after a correspondence upon objections to the title had ceased, by the defendants returning no answer to the last letter which called for a distinct answer, and threatened to file a bill, specific performance was decreed; the court observing, that one could easily imagine that circumstances might have happened which would have made it pceevish to file the bill immediately. (*h*)

Less time, however, will in general be allowed when the defendant has expressly refused, than when he merely tacitly neglects to

(*y*) *Carolan v. Brabazon*, 3 J. & L. 200.

(*z*) *Hood v. Pimm*, 1 C. P. C. N. R. 280.

(*a*) As to the effect at law of a parol variation of a written contract, see *Noble v. Ward*, L. R. 1 Exch. 117; L. R. 2 Exch. 135.

(*b*) *Ante*, 433, 434; *Quinn v. Roath*, 37 Conn. 16; *Pritchard v. Todd*, 38 Conn. 413.

(*c*) *Milward v. Earl of Thanet*, 5 Ves. 720, note; and see *South. E. R. Co. v. Knott*, 10 Hare, 122.

(*d*) *Harrington v. Wheeler*, 4 Ves. 686.

(*e*) *Alley v. Deschamps*, 13 Ves. 225.

(*f*) *Firth v. Greenwood*, 1 Jur. N. S. 866, V. C. W.; *Finch v. Parker*, 49 N. Y. 1; *Delevan v. Duncan*, 49 N. Y. 485.

(*g*) See *Eastman v. Plumer*, 46 N. H. 479; *De Cordova v. Smith*, 9 Texas, 129; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Mann v. Dunn*, 2 Ohio N. S. 187; *Smith v. Clay*, cited 3 Bro. C. C. 639; *Kerr F. &*

M. (1st Am. ed.) 303 *et seq.*; 2 *Watson Comp. Eq.* 1032, 1033; *Laird v. Smith*, 44 N. Y. 618; *Peters v. Delaplaine*, 49 N. Y. 362; *Rogers v. Saunders*, 16 Maine, 92; *Benedict v. Lynch*, 1 John. Ch. 375; *Garnett v. Macon*, 6 Coll. 308; *Reed v. Chambers*, 6 Gill & J. 490; *Merritt v. Brown*, 6 C. E. Green, 401; *Johns v. Norris*, 7 C. E. Green, 102; *Taylor v. Longworth*, 14 Peters, 172; 1 *Sugden V. & P.* (8th Am. ed.) 261-263, and notes; *Hull v. Noble*, 40 Maine, 473, 474.

(*h*) *Marquis of Hertford v. Boore*, 5 Ves. 719. Where time has not been made of the essence of the contract by its terms, although there may not be performance upon the day, if the delay is excused and the situation of the parties and the property unchanged, and the party reasonably vigilant, the court will relieve from the consequences of the delay. *Hubbell v. Von Schoening*, 49 N. Y. 326.

[perform the agreement; (*i*) in cases of the former description, periods of delay, varying from two years and a half (*k*) to twelve months, (*l*) have been held sufficient to bar the relief. (*m*) It does not, however, appear that time will run against the plaintiff so long as the question of completion remains under discussion; (*n*) or while he is substantially in possession of the benefit contracted for; (*o*) as *e. g.* where under a contract for a lease, possession was taken, and rent paid for several years. (*p*)

Less time allowed where there is a refusal to perform the contract.

The modern tendency of the court, however, has been to require the plaintiff to be prompt in seeking his equitable remedy; (*q*) and relief will be more readily refused on the ground of delay if the contract were originally, (*r*) or have by subsequent events become (*s*) a hard one; or if he have entered vexatiously; (*t*) or have entered into the contract without

Tendency of modern decisions as to delay.

(*i*) See *Haywood v. Cope*, 25 Beav. 140, 150.

(*k*) *Stewart v. Smith*, 6 Hare, 222, note; and see *Eads v. Williams*, 4 De G., M. & G. 674.

(*l*) *Watson v. Reid*, 1 Russ. & M. 236.

(*m*) See *Heaphy v. Hill*, 1 Sim. & Stu. 29, about two years' delay; *Walker v. Jeffreys*, 1 Hare, 341, two years; *Southcomb v. Bishop of Exeter*, 6 Hare, 213, nineteen months; *Moore v. Marrabee*, L. R. 1 Ch. Ap. 217, five years; *Finch v. Parker*, 49 N. Y. 1, three years and upward. Where, by laches, the remedy at law is barred, and the right to a specific performance forfeited, there can be no recovery of what has been paid upon the contract. *Finch v. Parker*, 49 N. Y. 1.

(*n*) See *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *M'Murray v. Spicer*, L. R. 5 Eq. 527; and *Moxhay v. Inderwick*, 11 Jur. 837, where a correspondence upon the shape of the conveyance was carried on at considerable intervals for nearly four years; and see *Gee v. Pearse*, 2 De G. & S. 325, 346, where V. C. K. B. remarked, that a purchaser not ready with the price according to the contract, ought to show a very special care for the interference of the court against the vendor. See, too, *Colby v. Gadsden*, 34 Beav. 416.

(*o*) *Clarke v. Moore*, 1 J. L. 723; and see *Hersey v. Giblett*, 18 Beav. 174.

(*p*) *Sharp v. Milligan*, 22 Beav. 606.

(*q*) *Southcomb v. Bishop of Exeter*, 6 Hare, 213. See *Nunn v. Truscott*, 3 De G. & S. 304; and *Parkin v. Thorold*, 16 Beav. 59, 62; *Delavan v. Duncan*, 49 N. Y. 485; *Graham v. Birkenhead &c. Railway Co.* 2 Mac. & G. 146, note (2); *Alloyway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 150; *Van Zandt v. New York*, 8 Bosw. 375; *Conway v. Kinsworthy*, 21 Ark. 9; *Du Bois v. Baum*, 46 Penn. St. 537; *Stretch v. Schenk*, 23 Ind. 77; *Taylor v. Longworth*, 14 Peters, 172; *Laverty v. Hall*, 19 Iowa, 526; *Clegg v. Edmondson*, 8 De G., M. & G. 787; *Lehmann v. McArthur*, L. R. 3 Ch. Ap. 496; *Moore v. Blake*, 1 Bal. & Bea. 69; *Fuller v. Hovey*, 2 Allen, 324; *Finch v. Parker*, 49 N. Y. 1. In cases seeking a specific performance, laches is equally as strong against a plaintiff in not proceeding in a suit, as in not commencing one. *Moore v. Blake*, 1 Bal. & Bea. 69. See, however, *Foster v. M'Mahon*, 11 Ir. Eq. R. 287.

(*r*) *Ante*, 1470 *et seq.*

(*s*) See *Alley v. Deschamps*, 13 Ves. 25, 230.

(*t*) See *Spurrier v. Hancock*, 4 Ves. 667; *Pope v. Simpson*, 5 Ves. 145.

[present means of performing it ; (*u*) or where the matter has not merely slept, but the defendant has actually refused to complete ; (*v*) or where the plaintiff has acted in reference to the estate in a manner inconsistent with the existence of the contract ; (*w*) or where the property is of fluctuating value. (*x*) In the case of an agreement for a lease, it could be only under very special circumstances, if at all, that the court would enforce specific performance after the stipulated term had expired. (*y*)

As to the second class of cases. Any act of the vendor, which prevents his giving to the purchaser that which was, substantially, the subject matter of the contract, *e. g.* the fall of ornamental timber, will be a defence to his suit for specific performance. (*z*)

So, the circumstance of the vendor having turned the purchaser out of possession (which he was entitled to under the contract, and had been allowed to take), has been held a sufficient defence to the vendor's suit. (*a*)

In the case just cited the purchaser had stipulated for immediate possession, which was not to be deemed an acceptance of the title ; and the decision has been held not to apply to a case where a purchaser is, under the common condition, let into possession on the day fixed for completion, but pays no portion of his purchase-money, nor any interest upon it ; under such circumstances a vendor may resume possession, as, *e. g.* by giving the tenants notice not to pay rent to the purchaser, without showing an intention to abandon his contract, or forfeiting his right to enforce it. (*b*)

So, if the plaintiff refuse or be unable to perform a material stipulation under the contract ; (*c*) as if it had been agreed that the vendor should become tenant of the estate for a

(*u*) See *Gee v. Pearse*, 2 De G. & S. 346. *Walters v. Northern Coal Co.* 2 Jur. N. S. 1 ; 5 De G., M. & G. 629 ; *De Brassac v. Martyn*, 11 N. R. 1020.

(*v*) *Guest v. Homfray*, 5 Ves. 818.

(*w*) See *Chambers v. Betty*, Beat. 488.

(*x*) *Pollard v. Clayton*, 1 Kay & J. 462 ; *Lloyd v. Wilkes*, 2 Eq. R. 1081 ; *Macbryde v. Weekes*, 22 Beav. 533 ; *Haywood v. Cope*, 25 Beav. 140 ; *Alloway v. Braine*, 26 Beav. 575 ; 1 Sugden V. & P. (8th Am. ed.) 261, note (*e*), 268, note (*e*) ; *Goldsmith v. Guild*, 10 Allen, 239 ; *Barnard v. Lee*, 97 Mass. 94.

(*a*) *Knatchbull v. Grueber*, 3 Meriv. 144.

(*b*) *Colby v. Gadsden*, 34 Beav. 416 ; 11 Jur. N. S. 760.

(*c*) See *Hunter v. Daniel*, 4 Hare, 433 ; *Counter v. Macpherson*, 5 Moo. 83. And see, as to the rule that "he who comes for

(*y*) See *Nesbitt v. Myer*, 1 Swanst. 223 ;

[term of fourteen years at a specified rent, and he became insolvent; (*d*) or that he should procure the unqualified withdrawal of a restrictive covenant and he fail to do so; (*e*) this may be a reason for refusing specific performance against the purchaser; but this defence was overruled when the agreement was for merely a yearly tenancy, and especially as the vendor's embarrassments were known to the purchaser. (*f*)

material stipulation under the contract,

So, where a party in possession under an agreement for a lease has done acts which would, had the lease been actually granted, have clearly entitled the lessor to reënter for a forfeiture, specific performance at the suit of the former will be refused. (*g*) And where there is a conflict of evidence as to whether there has been such a breach as will create a forfeiture, or as to whether it has been waived by receipt of subsequent rent, or otherwise, the court in decreeing specific performance, will direct the lease to be on date prior to the alleged breach, so as to give the lessor the opportunity of proceeding by ejectment or action of covenant, the lessee being put upon an undertaking to admit, in any such action, that the lease was executed on the day it bears date. (*h*)

or act of forfeiture by purchaser.

As to the third class of cases. If the plaintiff has brought an action at law, and has recovered damages for breach of contract, he will be held to have elected his remedy. (*i*)

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(*d*) See *Lord v. Stephens*, 1 You. & Coll. 228; *Neal v. Mackenzie*, 1 Keen, 473.

(*e*) *Reeves v. Greenwich Tanning Co.* 2 H. & M. 54.

(*f*) *Lord v. Stephens*, 1 You. & Col. 222, 228; *sed quare*, whether the length of the tenancy is material. See 1 Sugden V. & P. (8th Am. ed.) 297.

(*g*) *Gregory v. Wilson*, 9 Hare, 683; *Nunn v. Truscott*, 3 De G. & S. 304; *Lewis v. Bond*, 18 Beav. 85; and see, *Rogers v. Tudor*, 6 Jur. N. S. 692, and cases there cited.

(*h*) *Pain v. Coombs*, 3 Sm. & G. 449; 1 De G. & J. 34; *Lillie v. Legh*, 3 De G. & J. 204; *Rankin v. Lay*, 2 De G., F. & J. 65; *Rogers v. Tudor*, 6 Jur. N. S. 692;

Poyntz v. Fortune, 27 Beav. 393; *Morley v. Clavering*, 29 Beav. 87; *Parker v. Taswell*, 2 De G. & J. 573; *Noonan v. Orton*, 21 Wis. 283. Specific performance will not be decreed of an agreement to renew a lease which provided that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," if the assignee of the lease has allowed the premises to be used as a boarding-house, although the lessor has consented to his using them for sleeping rooms in connection with a girls' school. *Gannett v. Albree*, 103 Mass. 372.

(*i*) See *Sainter v. Ferguson*, 1 Mac. & G. 286; *Orne v. Broughton*, 10 Bing. 533, 538, 540; *Stuyvesant v. New York*, 11 Paige, 414; *Shepley J. in Hill v. Hobart*, 16 Maine, 169; *Hopkins v. Lee*, 6 Wheat.

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